Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DAVID WINTERS, *et al.*,
Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,
Appellees.

On Direct Appeal from the Three-Judge Panel in the United States District Court for the Northern District of Illinois

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the tie-breaker provision of the Illinois legislative redistricting scheme, which uses the "random selection" of a biased ninth member to resolve a deadlock of the bipartisan, eight-member redistricting commission, disenfranchises certain members of the electorate in violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the same tie-breaker provision impairs the right to vote in violation of the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

The Appellants are David Winters, Patricia Reid Lindner, J. Bradley Burzynski, Yolanda Campuzano, Armando Cardenas, Guadalupe Garcia, and Willie Jordan, Jr., who were original plaintiffs in the action before the district court, and James 'Pate' Philip and Lee A. Daniels, who intervened as plaintiffs in the district court.

The Appellees are the Illinois State Board of Elections and its Executive Director Ronald D. Michaelson, who were original defendants in the action before the district court, and John Tully and the League of United Latin American Citizens ("LULAC"), who intervened as defendants in the district court.

As each of the Appellants are individual persons and none are nongovernmental corporations, no corporate disclosure statement is required pursuant to Supreme Court Rule 29.6.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The unreported opinion of the three-judge district court denying plaintiffs' motion for judgment on the pleadings is set forth at *Winters v. Illinois State Board of Elections*, Nos. 01 C 50229 and 01 C 6566, 2001 WL 1491581, 2001 U.S. Dist. LEXIS 19335 (N.D. Ill. Nov. 20, 2001) and in the Appendix at A. The opinion and order of the three-judge district court denying plaintiffs' motions to file a second amended complaint and to alter or amend the judgment is set forth in the Appendix at B.

BASIS FOR JURISDICTION

The three-judge district court gave its oral decision on September 28, 2001. The district court entered a written

judgment on October 1, 2001, which is set forth in the Appendix at C. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253. A copy of Appellants' Notice of Appeal, filed on November 27, 2001, is set forth in the Appendix at D.

CONSTITUTIONAL PROVISIONS INVOLVED

The two relevant federal and state constitutional provisions—the Fourteenth Amendment of the United States Constitution and Article IV, Section 3(b) of the Illinois Constitution—are reproduced in the Appendix at E.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

In the decision below, a three-judge district court upheld the constitutionality of Article IV, Section 3(b) of the Illinois Constitution, which mandates a winner-take-all redistricting scheme that resorts to chance to select a biased decision-maker to determine the boundaries of Illinois' legislative and representative districts for electing members to the Illinois General Assembly. When the eight-member, bipartisan Illinois Legislative Redistricting Commission (the "Commission") charged with the task of redistricting the state comes to an impasse, which it inevitably does, the Illinois Constitution mandates that a tie-breaking ninth-member be appointed to the Commission.[1] *See* Amended Complaint (hereinafter "Am. Cmplt.") ¶¶ 26-27. After the Illinois Supreme Court chooses two potential candidates—one Republican and one Democrat—the Secretary of State draws the name of the ninth member from a crystal bowl or a replica of Abraham Lincoln's stovepipe hat. *See* Am. Cmplt.

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[1] Because this case was decided on a Rule 12(c) motion for judgment on the pleadings, all facts in the complaint must be taken as true. *See Forseth v. Village of Sussex*, 199 F.3d 363, 368 n.6 (7th Cir. 2000). The district court likewise recognized this fact. *See Winters*, 2001 WL 1491581, at *2.

¶¶ 33-34. The winning party, armed now with a majority of the Commission, invariably passes the partisan map of its choosing, without regard to the views of the party constituting a minority of the Commission or their constituents. *See* Am. Cmplt. ¶ 28. Rather than have the voters determine the balance of power in the General Assembly, Illinois leaves it to the random drawing of a name—and the singularly partisan redistricting that follows—to determine the political party that will control the state legislature for the next decade. *See* Am. Cmplt. ¶¶ 33-34.

This "democracy by lottery" redistricting scheme runs afoul of the Due Process Clause of the Fourteenth Amendment's proscription that government may not deprive the citizenry of basic liberties. The arbitrariness of the Illinois redistricting scheme cannot seriously be disputed—history has proven that once the ninth member is selected, the adoption of the map imposed by the victorious party is *a fait accompli*. *See* Am. Cmplt. ¶¶ 33-34. Thus, whether a Republican or Democratic map is ultimately enacted is left purely to chance, dependent only upon the luck of the draw. The entire system, infected with arbitrariness and chance, violates due process.

Illinois' redistricting process results in the disparate treatment of a class of voters in violation of the Equal Protection Clause of the Fourteenth Amendment. As this Court explained recently in *Bush v. Gore*, 531 U.S. 98 (2000), "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. Illinois' redistricting process does just that; it randomly grants one party the sole authority over redistricting, *see* Am. Cmplt. ¶¶ 33-34, and thereby values the rights of some voters more than others and denies millions of Illinois citizens the right to meaningfully participate in the electoral system. The manner in which districts are drawn dramatically impacts the extent

to which citizens may participate in the electoral process—an incumbent can be "drawn out" of a district; the district can become demographically predisposed to vote for a particular party; and communities may be split apart or held together depending upon the calculation or whimsy of the cartographer's pen. In short, the redistricting process so uniquely affects the right to vote that invoking arbitrary methods that disenfranchise certain members of the electorate in the drawing of districts violates equal protection.

The implications of this Court's decision will go beyond this redistricting cycle of the Illinois General Assembly. History has demonstrated that the random selection of a biased decision-maker through Article IV, Section 3(b) is the way redistricting will be conducted in Illinois. Through the past three redistricting cycles, Illinois voters have had their right to elect candidates of their choice circumscribed through an arbitrary selection of a biased decision-maker. The equal protection and due process guarantees ensure that citizens of Illinois should be afforded no less a democratic form of government than that afforded to citizens of other states. Absent the intervention of this Court, the voting rights of Illinois citizens will continue to be determined in a biased and arbitrary fashion.

Therefore, because Article IV, Section 3(b) of the Illinois Constitution violates both the due process and equal protection clauses of the Fourteenth Amendment, this Court should reverse the three-judge district court's decision and strike Article IV, Section 3(b) as unconstitutional.

II. FACTS PRESENTED TO THE THREE-JUDGE DISTRICT COURT

A. Summary of Illinois' Current Redistricting Process

The Illinois Constitution of 1970 provides the process for redistricting the Illinois General Assembly. Specifically,

Article IV, Section 3(b) states that "[i]n the year following each decennial census year, the General Assembly by law shall redistrict the Legislative Districts and Representative Districts." Ill. Const., art. IV, § 3(b). If a redistricting plan does not become effective by June 30 (of the year following the census year), the Illinois Legislative Redistricting Commission is formed to undertake the task of redistricting. *Id.*

The Commission initially has eight members, selected by the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the Senate, each of whom appoint one Senator/Representative and one person who is not a member of the General Assembly. *Id.* Because the eight members are selected by the partisan leadership of the General Assembly, an even split between Democrats and Republicans is guaranteed. *Id.*; *see also* Am. Cmplt. ¶ 25. In fact, Section 3(b) effectively mandates that the Commission be comprised of four Democrats and four Republicans by requiring that "no more than four of [the eight Commission members] shall be members of the same political party." Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 25. The Commission has until August 10 to file a redistricting plan, but because of the even split between the Democrats and Republicans on the Commission, the probability of a deadlock is very high—if not inevitable. *See* Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 26.

When the Commission reaches an impasse and fails to submit a redistricting plan by August 10, the entire process resorts to chance to break the deadlock. *See* Am. Cmplt. ¶ 27. Specifically, Section 3(b) provides:

> If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

> Not later than September 5, the Secretary of State publicly shall draw by *random selection* the name of one of the two persons to serve as the ninth member of the Commission.

Ill. Const., art. IV, § 3(b) (emphasis added); *see also* Am. Cmplt. ¶ 27.

When one of the names is selected, a 5-4 majority—created through the selection of a biased decision-maker purely by chance—ensures one of the parties' total victory. *See* Am. Cmplt. ¶ 28. Where district lines are drawn can dictate the political make-up of the General Assembly. By ensuring the right mix of geography containing historically Democratic and Republican voters, one party or the other can ensure it will win in a majority of the districts.

By October 5, the nine member Commission must file a redistricting plan, approved by at least 5 members. Ill. Const., art. IV, § 3(b); *see also* Am. Cmplt. ¶ 29. The plan "shall be presumed valid, [and] shall have the force and effect of law." Ill. Const., art. IV, § 3(b). Barring further judicial action, defendant Illinois State Board of Elections is required to conduct any future elections pursuant to that map. *See id.*; *see also* Am. Cmplt. ¶ 29.

B. History of Illinois Redistricting Under Section 3(b)

The first time the random selection provision was invoked was in the 1981 redistricting cycle, following the 1980 census.[2] At that point, the political balance of power was

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[2] Section 3 was promulgated pursuant to the Illinois Constitutional Convention of 1970. *See Winters*, 2001 WL 1491581, at *4; *see also* Am. Cmplt. ¶ 24. Since that time, the General Assembly has never agreed upon a redistricting plan, thereby leading to the creation of the Commission during each redistricting cycle. *See* Am. Cmplt. ¶¶ 31-34. Furthermore, the first redistricting cycle in 1971—which directly followed the extraordinary bipartisan effort of creating the 1970 Constitution—

split by chamber, with the Democrats having a majority in the Senate and the Republicans a majority in the House. Not surprisingly, the legislature did not agree on a new map, and the legislative leaders appointed a Commission as provided in the 1970 Constitution. Because the bipartisan Commission could not agree on a new map, the random selection provision of Section 3(b) was implemented. *See* Am. Cmplt. ¶ 32.

As provided by the Illinois Constitution, the Supreme Court submitted the names of two persons "not of the same political party"—former Republican Governor Richard Ogilvie and former Democratic Governor Samuel Shapiro—to be selected at random by the Secretary of State. In a public ceremony, the Secretary of State drew the name of Governor Shapiro out of Abraham Lincoln's stovepipe hat. The Commission, with a 5-4 Democratic majority, drew a map that favored the Democrats and allowed them to retain control of both houses of the General Assembly for the entire decade. *See* Am. Cmplt. ¶ 33.

In 1991, the General Assembly could not agree on a map, the Commission became deadlocked, and the random selection provision was again invoked. The Illinois Supreme Court submitted the names of Albert Jourdan, chairman of the State Republican Party, and former Democratic Supreme Court Justice Daniel Ward. The Secretary of State selected Jourdan's name out of a crystal bowl. With a Republican majority, the Commission adopted a Republican-proposed map that led to Republican control of the Senate for the next decade, and control of the House from 1994-1996. *See* Am. Cmplt. ¶ 34. The process by which the Commission originally adopted a map was condemned by the Illinois Supreme Court and remanded for additional adversarial

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represents the only time redistricting was accomplished without the random selection of a ninth member to the Commission. *See* Am. Cmplt. ¶ 31.

hearings and public comment. *See People ex rel. Burris v. Ryan*, 588 N.E.2d 1023, 1029-30 (Ill. 1991); *see also* Am. Cmplt. ¶ 38.

In 2001, the Illinois General Assembly and the eight member Commission did not produce a map, and the random selection provision was again invoked. The Illinois Supreme Court submitted the names of former Democratic Chicago mayor and Supreme Court Justice Michael Bilandic and former Republican Supreme Court Justice Benjamin Miller. The Secretary of State selected Democrat Bilandic's name from a replica of Abraham Lincoln's stovepipe hat. The Democratic majority on the Commission went on to approve a Democratic map by a 5-4 partisan vote.

III. PROCEEDINGS AND OPINION BELOW

Appellants David Winters, Patricia Reid Lindner, J. Bradley Burzynski, Yolanda Campuzano, Armando Cardenas, Guadalupe Garcia, and Willie Jordan, Jr., originally filed this action on July 17, 2001. A three-judge panel was appointed on August 3, 2001. On August 20, 2001, Appellants filed their first amended complaint, and on September 10, 2000, James 'Pate' Philip and Lee A. Daniels were granted leave to intervene.[3]

On September 18, 2001, the parties filed cross-motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The three-judge panel heard oral argument

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[3] In a related case, Benjamin Barnow filed suit in the Illinois Supreme Court on August 17, 2001, No. 92613, also challenging Section 3(b) as unconstitutional. The Attorney General removed the case to federal court and the three-judge district court hearing *Winters* granted the motion to reassign *Barnow* to the same panel on September 12, 2001. Although the cases were not formally consolidated, the district court heard consolidated oral argument in both cases on September 28, 2001 and issued the same judgment and opinion in both cases on October 1, 2001.

on September 28, 2001, and issued an oral ruling granting defendants' motions that day. The Court issued its minute order and Memorandum Opinion and Order on November 20, 2001. (Appendix at A). Appellants filed their Notice of Appeal on November 27, 2001. (Appendix at D).

REASONS FOR REVERSING THE DISTRICT COURT

The right to vote encompasses more than just the right to walk into a voting booth and pull the lever, check the box, or punch the card. In the seminal reapportionment case of *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court recognized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555; *see also Bush*, 531 U.S. at 104 ("The right to vote is protected in more than the initial allocation of the franchise."). The Court has repeatedly recognized that the right to vote includes not only the right to cast a ballot, but also the right to have that vote meaningfully counted and, ultimately, the right to fair and effective representation in federal, state, and local government.

The tie-breaker provision unnecessarily impinges on these rights and thus violates the equal protection and substantive due process guarantees of the Fourteenth Amendment. Because the tie-breaker provision impinges on the fundamental right to vote, the district court was required to apply the strict scrutiny standard to the provision, rather than rational basis. Under the strict scrutiny standard, this Court should strike down Section 3(b) as the provision and the classification it creates is not narrowly tailored to any compelling state interest.

I. SECTION 3(b) IMPINGES UPON THE FUNDAMENTAL RIGHT TO VOTE AND IS SUBJECT TO STRICT SCRUTINY

It is clear that this Court has long held that the right to vote is a fundamental right. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking apportionment scheme that created a congressional district containing two to three times as many voters as other districts); *see also Reynolds*, 377 U.S. at 561-62 (stating, in striking reapportionment scheme that failed to adequately take population into account, that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating, in the context of holding unconstitutional the administration of an ordinance that discriminated against Chinese-Americans, that "the political franchise of voting is . . . a fundamental political right, because preservative of all rights"). This fundamental right to vote encompasses redistricting matters. *See Reynolds*, 377 U.S. 533 (striking state legislative apportionment plans based on the their impairment of the "constitutionally protected right to vote" in state elections); *cf. Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976) ("These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography.").

Because the right to vote is a fundamental liberty interest, a state provision challenged on due process and equal protection grounds as impairing the fundamental right to vote cannot survive unless it can withstand the highest level of constitutional scrutiny. Pursuant to equal protection analysis, this Court has "treated as presumptively invidious those

classifications . . . that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest." *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (holding that the Fourteenth Amendment's equal protection guarantee extends to illegal aliens excluded from public schools); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667, 670 (1966) (stating, in striking down poll tax, that the political franchise of voting is a "fundamental political right" and "classifications which might invade or restrain [fundamental rights] must be closely scrutinized and carefully confined" (citations omitted)). Likewise, this Court has held that substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that right to assistance in committing suicide is not a fundamental right); *see also Harris v. McRae*, 448 U.S. 297, 312 (1980) (stating, in the context of finding that withholding federal funds for abortions did not violate a fundamental right, that "[i]t is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'" (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (plurality opinion))).

Thus, any infringement on the fundamental right to vote via provisions regulating the redistricting process must be reviewed under strict scrutiny. *Plyler*, 457 U.S. at 216-17 n.15 ("With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights."); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (upholding California property tax system); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (stating, in striking down voter residency

requirement for failing to further a compelling state interest, that "before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny" (quoting *Evans v. Cornman*, 398 U.S. 419, 422 (1970))); *Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basis civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). Under this strict scrutiny standard, the State must demonstrate that Article IV, Section 3(b) of the Illinois Constitution advances a compelling state interest and is narrowly tailored to serve that interest. *Cf. Plyler*, 457 U.S. at 216-17 (classifications must be "precisely tailored to serve a compelling governmental interest"). The State has not met, and cannot meet, this burden.

No one disputes that the State has a compelling interest in seeing that its legislature is reapportioned in compliance with the "one man, one vote" mandate of *Reynolds v. Sims*. *Cf. Winters*, 2001 WL 1491581, at *4 ("No one seriously doubts the State of Illinois has a legitimate interest in legislative redistricting."). However, the State must also demonstrate that the classifications established and the means utilized are narrowly tailored to serve this interest. Thus, while Illinois may have a compelling state interest in legislative redistricting, the tie-breaker provision's random determination of which party redistricts the state is not narrowly tailored to this interest. The State has not attempted to explain how the tie-breaker is narrowly tailored to accomplish the redistricting task, a task which each of the other 49 states also confronts every ten years without resort to a random and arbitrary tie-breaker drawn from a hat, but rather through more narrowly tailored means that do not violate the fundamental right to vote. Indeed, each of the other states that utilize some form of legislative redistricting commission provide for the resolution of any deadlock that

could develop from an even-numbered entity in charge of redistricting by either providing for the initial creation of an odd-numbered entity, *see, e.g.*, Ariz. Const., art. IV, pt. 2, § 1(3); Ark. Const., art. 8, § 1; Colo. Const., art. V, § 48; Del. Const., art. II, § 2A; Haw. Const., art. IV, § 2; Maine Const., art. IV, pt. third, § 1-A; Va. Code Ann. § 24.2-300 (West 2001), or requiring *someone*—whether it be the state supreme court, the governor, or other public figure—to be accountable for selecting the tie-breaker or choosing the plan, *see, e.g.*, Iowa Const., art. III, § 35; Mich. Const., art. IV, § 6; Mont. Const., art. V, § 14(2); Pa. Const., art. II, § 17(b); Wash. Const., art. 2, § 43(6).

In fact, public officials in Illinois have themselves admitted that the random selection of the tie-breaker ninth member is not narrowly tailored to meet the state's compelling interests and have sought to formulate a better redistricting scheme. Following the 1991 redistricting cycle, then Secretary of State George Ryan convened a special commission to review the redistricting process and to suggest changes to the process, if necessary. *See* Report of Redistricting Process Review Commission ("Review Commission"), set forth in the Appendix at F; *see also* Am.Cmplt. ¶ 39. The Review Commission was a bipartisan effort of former legislative leaders, academics, and civic leaders. The Review Commission held twenty-five meetings around the state, which included testimony by leading national experts on redistricting. The Review Commission ultimately proposed the use of a computer program to draw the new districts in the event of an impasse, thereby eliminating the "democracy by lottery" of the current scheme. That the Review Commission's conclusions were not adopted is immaterial to the fact that even the highest ranking state officials admitted that the current process was not narrowly tailored to suit the state's redistricting needs. The Review Commission's

findings themselves are clear evidence that other, more narrowly tailored means do exist. Thus, because this arbitrary redistricting scheme is not narrowly tailored, the Court should declare it unconstitutional and violative of both due process and equal protection.

II. THE DISTRICT COURT ERRED IN FINDING THAT SECTION 3(b) DOES NOT VIOLATE EQUAL PROTECTION OR SUBSTANTIVE DUE PROCESS

Rather than address Section 3(b)'s infringement on the fundamental right to vote and subject it to the strict scrutiny required, the district court held that Section 3(b) does not create a classification in violation of the Equal Protection Clause and does not implicate a "clearly identified" right under the Due Process Clause. The district court's analysis was erroneous and must be reversed.

A. Section 3(b) Violates Equal Protection.

Contrary to the district court's holding, the Equal Protection Clause does apply to this case. Although Section 3(b) does not single out one political party *per se*, it, *by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process. Section 3(b) guarantees that one party will be subjected to the will of the other based upon the random selection of a biased decision-maker. A fair redistricting process would enable citizens of both parties, through their elected representatives, to provide input into the configuration of the new districts. Through an arbitrary process that grants one party the sole authority over redistricting, however, the State values the rights of some voters more than others—namely, those of the chosen party are favored over those of the excluded party.

Such a result is prohibited. This Court has expressly recognized that in the redistricting context, the Equal Pro-

tection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds*, 377 U.S. at 576. "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336; *see also Bush*, 531 U.S. at 105, 107 (holding that vote recount procedures "do not satisfy the minimum requirements for non-arbitrary treatment necessary to secure the fundamental right [to vote]" and "was not a process with sufficient guarantees of equal treatment"); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding, in the context of the government's demand for an easement from a homeowner, that the purpose of the Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents"); *Plyler*, 457 U.S. at 217 n.15 ("[W]e have also recognized the fundamentality of participation in state elections on an equal basis with other citizens in the jurisdiction." (internal quotations and internal citations omitted)). Illinois' system for redistricting, however, treats similarly situated voters differently, depending upon their political affiliation.

Indeed, at least one circuit court has found that discrimination in election matters on the basis of political affiliation violates equal protection. *See Charfauros v. Board of Elections*, 249 F.3d 941 (9th Cir. 2001). In *Charfauros*, the Ninth Circuit found an equal protection violation in a board of elections' decision to bar voting by those subject to Democratic Party challenges while allowing voting by those subject to Republican Party challenges. The court held that "[p]utting such a price tag on the right to vote—particularly when only an arbitrarily selected few are forced to pay—violates the equal protection clause and is therefore unconstitutional." *Id.* at 954.

The same result should obtain here where the express terms of Section 3(b) operate to arbitrarily exclude one of the two major political parties from participating in the redistricting process.

B. Section 3(b) Violates Due Process.

Also contrary to the district court's holding, the Due Process Clause does apply to this case. The district court improperly held that appellants did not satisfactorily provide a "careful description" of the right asserted and that such a right "must be defined in concrete, specific terms, not abstract generalizations." *Winters*, 2001 WL 1491581, at *3 (citing *Glucksberg*, 521 U.S. at 721-22). Even if such a "careful description" is required, appellants have satisfied their burden. Appellants have amply demonstrated that the random selection of the tie-breaker determines which party redistricts the state, thereby directly impacting the right to vote of each citizen in Illinois. As this Court has long held, the right to vote is a fundamental right, *see Reynolds*, 377 U.S. at 561-62 ("[T]he right of suffrage is a fundamental matter in a free and democratic society."), and the redistricting process directly impacts the right to vote, *see id.*; *Buckley*, 424 U.S. at 49 (noting that reapportionment decisions serve to assure each citizen an equal right to vote). Thus, the redistricting process and the selection of a biased decision-maker that dictates the process' conclusion is not "abstractly" related to the fundamental right to vote, but rather is integral in determining the extent to which any single vote can truly influence representative government.

The district court also improperly applied a rational basis test to the infringement of a fundamental right.[4] The district

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[4] The district court considered the possibility of applying an intermediate scrutiny standard found in ballot access and election procedure cases. These cases focus on state regulation of the place, time, and manner of holding elections, and the rationale for intermediate scrutiny of such regulations is based on the presumption that, although "voting is of

court found that the random selection of a tie-breaker pursuant to Section 3(b) was rationally related to an important state interest by accepting the rationale of the framers at the 1970 Illinois Constitutional Convention. The framers, in drafting Section 3(b) and the ninth member "doomsday" clause, believed that no party would risk losing it all for the even chance of winning it all. As the district court noted, the framers "believed it would give both political parties an incentive to compromise because neither side would want to risk losing the random drawing." *Id.* at *4. But as the district court also admits, the framers were wrong, because this is exactly the risk the parties have taken in each of the redistricting cycles since 1980. *Id.* ("History proves it has had just the opposite of its desired effect. Rather than forcing the parties to find common ground for fear of losing the random drawing, they are apparently willing to dig in their heels with the hope of winning the draw.") What once may have been rational has, through history, been proven irrational. Thus,

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the most fundamental significance under our constitutional structure[,] [i]t does not follow . . . that the right to vote in any *manner* and the right to associate for political purposes through the *ballot* are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (emphasis added) (citations omitted) (holding that ban on write-in voting did not violate due process). The district court erroneously inferred from these ballot access and election procedure cases that "[i]n recent years, the Supreme Court has backed off somewhat from its strict categorical approach to the right to vote." *Winters*, 2001 WL 1491581, at *3.

Any possible guidance the district court may have gathered from the ballot access and election procedure cases is inapplicable to the issue of whether Section 3(b) violates the fundamental right to vote. However, even under *Burdick*'s balancing approach, Section 3(b) still fails to pass constitutional muster. Had the district court properly applied the *Burdick* balancing test, it would have weighed the severe infringement on the right to vote against the state's interest in having a redistricting plan expeditiously approved via the random selection of a tie-breaker and would have found that the state's interest does not and cannot outweigh the severe restriction on Illinois citizens' right to vote and have their votes count in a meaningful way.

the statute fails to pass even a rational basis analysis, let alone the narrowly tailored requirement under strict scrutiny.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, WESTERN DIVISION.

No. 01 C 50229, 01 C 6566.

DAVID WINTERS, PATRICIA REID LINDNER, J. BRADLEY BURZYNSKI, YOLANDA CAMPUZANO, ARMANDO CARDENAS, GUADALUPE GARCIA, and WILLIE JORDAN, JR., registered voters and Illinois citizens,

Plaintiffs,

v.

ILLINOIS STATE BOARD OF ELECTIONS and RONALD D. MICHAELSON, in his capacity as EXECUTIVE DIRECTOR of the ILLINOIS STATE BOARD OF ELECTIONS,

Defendants.

BEN BARNOW, individually as a registered voter,

Plaintiff,

v.

JIM RYAN, in his official capacity as the ILLINOIS ATTORNEY GENERAL, JESSE WHITE, in his official capacity as the ILLINOIS SECRETARY of STATE, the STATE BOARD OF ELECTIONS and its members, JOHN R. KEITH, WILLIAM M. MCGUFFAGE, DAVID E. MURRAY, PHILIP R. O'CONNOR, ALBERT PORTER, ELAINE ROUPAS, WANDA L. REDNOUR, and JESSE SMART, all named in their official capacities, the ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION and its members, TOM CROSS, BARBARA FLYNN CURRIE, VINCE DEMUZIO, WALTER DUDYCZ, RAYMOND EWELL, THOMAS MARCUCCI, THOMAS MCCRACKEN, and JORGE RAMIREZ, all named in their official capacities,

Defendants.

Nov. 20, 2001

MEMORANDUM OPINION AND ORDER

KANNE, *Circuit J.*

On September 28, 2001, this court heard consolidated oral argument in the above two cases. That same day, due to impending deadlines imposed by the Illinois Constitution and the necessity of an immediate decision, the court announced its decision from the bench and entered orders disposing of both cases with a written opinion to follow in due course. This is that opinion.[1]

I. INTRODUCTION

On August 20, 2001, plaintiffs in Case No. 01 C 50229 (collectively referred to as "the *Winters* plaintiffs") filed a first-amended complaint against defendants, the Illinois State Board of Elections and Ronald D. Michaelson, in his capacity as the Executive Director of the Illinois State Board of Elections. The court has since granted leave to the following parties to intervene in the *Winters* action: John Tully, intervening as a defendant, James "Pate" Philip and Lee A. Daniels (collectively referred to as "the Philip intervenors"), intervening as plaintiffs, and the League of United Latin American Citizens ("LULAC"), intervening as a plaintiff.

Meanwhile, plaintiff in Case No. 01 C 6566, Ben Barnow, originally filed his two-count complaint against defendants,[2] Jim Ryan, in his official capacity as the Illinois Attorney General, Jesse White, in his official capacity as the Illinois Secretary of State, the State Board of Elections and its members, all in their official capacities, and the Illinois Legislative Redistricting Commission and its members, all in

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[1] Just as it did for oral argument, the court has consolidated these nearly identical cases for purposes of this opinion.

[2] Unless otherwise noted, the court will collectively refer to all of the original defendants in both the *Winters* and *Barnow* cases as, simply, "defendants."

their official capacities, with the Illinois Supreme Court on August 17, 2001. The Attorney General, acting on behalf of the Barnow defendants, subsequently removed the *Barnow* case to the Northern District of Illinois under 28 U.S.C. § 1441(a), on the basis of federal question jurisdiction, *see id.* § 1331.

Because the *Winters* and *Barnow* complaints each challenge the constitutionality of Illinois' reapportionment and legislative redistricting process, this three-judge court was convened pursuant to 28 U.S.C. § 2284 and assigned to both cases. Jurisdiction and venue for the cases are proper in this district and division under 28 U.S.C. § § 1331, 1367, 1391.

II. BACKGROUND

Article IV, § 3(b) of the Illinois Constitution sets forth the manner in which the State of Illinois reapportions its legislative and representative districts. If the Illinois General Assembly is unable to agree on a redistricting plan, the task is charged to a Legislative Redistricting Commission ("the Commission"). The Commission is initially composed of eight members, no more than four of whom may be members of the same political party. Should the eight-member Commission deadlock and fail to approve a redistricting plan by majority vote before August 10, a ninth, tie-breaking member is appointed. To choose the ninth member, article IV, § 3(b) directs the Illinois Supreme Court to submit the names of two persons, not of the same political party, to the Secretary of State. The Secretary of State is then called upon to publicly "draw by random selection" the name of one of the two persons, who then becomes the ninth Commission member.

It is this so-called "tie-breaking provision," requiring the ninth Commission member to be picked at random, that precipitated the *Winters* plaintiffs and Barnow to file suit. They, along with the Philip intervenors, urge the court to

declare that the tie-breaking provision of article IV, § 3(b) of the Illinois Constitution violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Opposing them are defendants and Tully, who seek to uphold the constitutionality of the tie-breaking provision. At the court's request, all of the parties (except LULAC, which affirmatively disclaimed any interest in doing so) submitted cross-motions for judgment on the pleadings regarding this and other specified issues, pursuant to Federal Rule of Civil Procedure 12(c). As it turns out, only the question of whether the tie-breaking provision violates the Fourteenth Amendment requires the court's attention in this opinion.

III. ANALYSIS

A. *Judgment on the Pleadings*

A motion for judgment on the pleadings under Rule 12(c) is treated the same as one to dismiss for failure to state a claim under Rule 12(b)(6): the court accepts as true all well-pleaded allegations in the complaint and draws all reasonable inferences there from in favor of the plaintiffs. *See Forseth v. Village of Sussex,* 199 F.3d 363, 368 & n. 6 (7th Cir.2000). A Rule 12(c) motion will be granted only if it appears beyond doubt that the plaintiffs cannot prove any facts that would support a claim for relief. *See id.* at 368.

The Winters plaintiffs and Philip intervenors (who filed a joint motion) suggest theirs is "essentially a motion for summary judgment," but this apparently assumes the court will consider the voluminous exhibits they have attached to their motion and response brief. However, the vast majority of materials they have tried to introduce are simply irrelevant to the court's decision. Indeed, the court wishes to make clear the only documents outside the pleadings it has considered are the verbatim transcripts from the Sixth Illinois Constitutional Convention—an item the court may properly

take judicial notice of as a matter of public record without converting the motions for judgment on the pleadings into ones for summary judgment. *See Anderson v. Simon*, 217 F.3d 472, 474-75 (7th Cir.2000), *cert. denied*, 531 U.S. 1073 (2001); *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir.1991). All other documents, exhibits, and materials attached to the parties' briefs and motions are stricken.

B. *Substantive Due Process*

Although the *Winters* and *Barnow* complaints challenge the tie-breaking provision on various grounds, the court believes the proper analysis is based on substantive due process. The first problem this poses is which standard of review the court should apply—strict scrutiny, rational basis, or something in between? All the parties seem to agree some form of rational basis review is appropriate, but it is less clear why that is so.

Defendants believe the Supreme Court's election law and voting rights cases provide the proper framework for evaluating the tie-breaking provision. In recent years, the Supreme Court has backed off somewhat from its strict categorical approach to the-right to vote. *Compare Reynolds v. Sims*, 377 U.S. 533, 554-55, 562 (1964) (right to vote is fundamental and any alleged infringement on right to vote must be "carefully and meticulously scrutinized"), *and Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (right to vote is a fundamental right subject to strict scrutiny), *with Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (right to vote *per se* is not a constitutionally protected right), *and Burdick v. Takushi*, 504 U.S. 428, 432-33 (1992) (right to vote in any manner through the ballot is not absolute and law imposing burden on right to vote is not necessarily subject to strict scrutiny). It now uses a "more flexible standard" when a state election law impacts the right to vote, adjusting the rigorousness of the inquiry depending on the extent to which

the challenged regulation burdens Fourteenth Amendment rights. *See Burdick,* 504 U.S. at 434. Under *Burdick,* defendants suggest strict scrutiny is inappropriate because Illinois' tie-breaking provision does not subject the rights of Illinois voters to "severe" voting restrictions. *See id.* In fact, according to defendants, the tie-breaking provision does not affect a voter's access to the ballot, access to the polls, or burden a person's voting rights in any other way. If anything, they say, the random selection of a ninth Commission member imposes nothing more than a "reasonable, nondiscriminatory restriction" on the right to vote, thus calling for rational basis review. *See id.*

The court, however, need not ultimately decide how the tie-breaking provision would fare under *Burdick,* as it will instead apply the Supreme Court's more generic substantive due process analysis. This too, it should be noted, points to a rational basis test.

If a piece of legislation does not burden a fundamental right, substantive due process requires only that it be rationally related—in other words, that it not be completely arbitrary and lacking any connection—to a legitimate government interest. *See Washington v. Glucksberg,* 521 U.S. 702, 728 (1997); *Turner v. Glickman,* 207 F.3d 419, 426 (7th Cir.2000). Whether a "fundamental right" is involved in the first place demands a "careful description" or formulation of the asserted fundamental liberty interest. *Glucksberg,* 521 U.S. at 721, 722. This means the liberty interest at issue must be defined in concrete, specific terms, not abstract generalizations. *See id.* at 722; *Khan v. Gallitano,* 180 F.3d 829, 833-34 (7th Cir.1999).

One possibility here is to define the liberty interest at stake more broadly so as to implicate the right to vote. By determining who becomes the ninth Commission member, who in turn will likely cast the deciding vote on which reapportionment map the Commission will approve, the tie-

breaking provision undeniably has some indirect effect, down the road at least, on a person's right to vote. But interpreting the tie-breaking provision as falling under the umbrella of the right to vote in this way is premised on a much more abstract notion of that right than the Supreme Court's substantive due process jurisprudence allows. Rather, the specific question before the court in the present cases is more narrowly framed as: "Is there a fundamental right to have the tie-breaking member of a redistricting commission chosen by some means other than by lot?" *Cf. Glucksberg,* 521 U.S. at 722-23 (issue was not whether there is fundamental right to die, but whether there is "right to commit suicide which itself includes a right to assistance in doing so"); *Khan,* 180 F.3d at 833-34 (fundamental right was not the general or broad right to contract, but the "right to be free from state officials tortiously interfering with one's existing contractual relationships"). The answer to that is obviously, "Of course not," and nobody suggests otherwise. As no other fundamental right is arguably implicated, the court will apply the "highly deferential" rational basis review. *Turner,* 207 F.3d at 426.

No one seriously doubts the State of Illinois has a legitimate interest in legislative redistricting. The Supreme Court has repeatedly emphasized the primary responsibility for legislative and congressional reapportionment lies with the States. *See Growe v. Emison,* 507 U.S. 25, 33-34 (1993); *Miller v. Johnson,* 515 U.S. 900, 915 (1995). And, in this court's opinion, the tie-breaking provision is rationally related to that interest.

Given the politically sensitive nature of the ninth Commission member's position in Illinois' redistricting scheme, it would seem, at first blush anyway, picking that member's name out of a hat is anything but rational. But the delegates at the 1970 Illinois Constitutional Convention—whence the tie- breaking provision came—had their reasons.

Specifically, they believed it would give both political parties an incentive to compromise because neither side would want to risk losing the random drawing. As one delegate explained:

> The object of the reapportionment plan . . . is to reduce both political parties to a state of equivalency. We believe we achieve this by utilizing the random selection method of achieving a tie-breaker, whereby neither party could look ahead with certainty as to a potentional [sic] tie-breaker being more in line with their opinions than with the other party's opinions.
>
> * * *
>
> [W]e believe we have adopted the most sensible [tie-breaker reapportionment scheme] in that it does not at any stage give the impetus to one party or the other to stalemate, because it can look to the tie-breaker system and figure out that it might have a better advantage further down the road.

IV RECORDS OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, at 2955, 2956 (July 21, 1970) (statements of Del. Sommerschield). This justification for the random selection of the tie-breaking Commission member—to act as a catalyst for bipartisan cooperation during reapportionment—is perfectly reasonable, or at least not so totally unreasonable that it fails the rational basis test.

In some respects, it may even be more rational than the procedures found in other states. For example, in four states where a redistricting commission is used, the tie-breaking member is chosen by either a majority of the state's Supreme Court or the Chief Justice of the state Supreme Court. *See* Alaska Const. art. VI, § 8; Mont. Const. art. V, § 14(2); N.J. Const. art. IV, § 3, ¶ 2; Pa. Const. art. II, § 17(b). As a result, the commission members in these states who may be

affiliated with the same political party as the state Supreme Court's majority or its Chief Justice may have no incentive to compromise because they can safely assume the tie-breaker will end up in their favor.

The delegates of the 1970 Illinois Constitutional Convention reasonably thought they could avoid this problem with the use of a random drawing. Unfortunately, as it turned out, they were wrong, and the Winters plaintiffs and Philip intervenors spend a great deal of time trying to prove just how wrong they were by recounting the rather ignominious past of the tie-breaking provision and the sharp criticism it has received over the years. History proves it has had just the opposite of its desired effect. Rather than forcing the parties to find common ground for fear of losing the random drawing, they are apparently willing to dig in their heels with the hope of *winning* the drawing. In fact, the Commission has resorted to the tie-breaking provision in each of the last three rounds of reapportionment in Illinois. (Winters Am. Compl. ¶¶ 32-34; Barnow Compl. ¶¶ 49-59) Accepting them as true, these arguments illustrate well that the tie-breaking provision has not done what it was supposed to do: prevent deadlock in the Commission. The Winters plaintiffs and Philip intervenors also point out that Illinois, in choosing the tie-breaking member by lot, is unique among states with redistricting commissions. (Winters Pls. & Philip Intervenors Mem. in Supp. of Mot. for J. on the Pleadings, Exh. E) So what does all this mean? In terms of substantive due process analysis, not much.

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory," *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), to conduct novel experiments in the "science of government" and test solutions to difficult problems of policy; such a state is given broad

latitude, its decisions subject only to the minimum requirements of the Fourteenth Amendment that they not be arbitrary, capricious, or unreasonable. *See Smith v. Robbins,* 528 U.S. 259, 273-75 (2000); *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 546 (1985) (quoting *Anderson v. Dunn,* 5 L.Ed. 242, 247 (1821)); *Chandler v. Florida,* 449 U.S. 560, 579 (1981) (quoting *Liebmann,* 285 U.S. at 311 (Brandeis, J., dissenting)); *Whalen v. Roe,* 429 U.S. 589, 597 (1977). Perhaps the *Winters* plaintiffs and Philip intervenors are right that Illinois' experiment to choose the tie-breaking Commission member by chance has been a real-world failure. But that need not concern this court. Reapportionment is, without question, a thorny issue of public policy, one where a state deserves plenty of leeway to experiment and, sometimes, make mistakes. *See Growe,* 507 U.S. at 34; *cf. Rodriguez,* 457 U.S. at 8 (methods used by Puerto Rico to structure its electoral system given "substantial deference"). What matters for present purposes is whether the idea behind the tie-breaking-by-lot experiment makes a reasonable amount of sense. As explained above, it does, and not even the Winters plaintiffs and Philip intervenors seriously dispute this. Because the tie-breaking provision is rationally related to Illinois' significant interest in the reapportionment process, the court finds it does not violate the substantive component of the Due Process Clause.

This is so despite Justice Bilandic's dissenting opinion in *People ex rel. Burris v. Ryan,* 588 N.E.2d 1033 (Ill.), *cert. denied,* 504 U.S. 973 (1992). Justice Bilandic argued the tie-breaking provision does not comply with due process because it arbitrarily establishes legislative districts, which in turn impacts "the rights of Illinois citizens to participate on a fair and equal basis in the electoral process." *Burris,* 588 N.E.2d at 1042 (Bilandic, J., dissenting). In reaching this conclusion, he relied heavily on *Walker v. State Board of Elections,* 359 N.E.2d 113 (Ill.1976), where the Illinois Supreme Court addressed a section of the Illinois Election Code providing for

the disqualification of a single member of the State Board of Elections in the case of a deadlock, with the member's name drawn by lot. The court struck down this section on two grounds: (1) it violated due process because it caused decisions to be arrived at in an arbitrary manner and left the ultimate outcome to chance; and (2) it violated article III, § 5 of the Illinois Constitution, which prohibits any political party from having a majority on the Board. *See id.* at 123.

This court finds Justice Bilandic's dissent in *Burris* unpersuasive and the majority opinion in *Walker* distinguishable for various reasons. First, Justice Bilandic seemed to assume without discussion the tie-breaking provision of article IV, § 3(b) could be subsumed under the broader fundamental right to vote for substantive due process analysis—a notion this court has explicitly rejected earlier in this opinion. More importantly, he did not analyze the crucial question of whether the rationale behind that provision could save it from a due process attack. As for *Walker,* the tie-breaking provision in that case involved the random *disqualification* of a board member, so as to *prevent* a duly-appointed state constitutional officer from casting his or her vote. In contrast, the tie-breaking provision at issue here calls for the random *addition* of another Commission member, so it does not affect the ability of the other eight Commission members to cast their votes. The holding in *Walker* also depended in part on a separate section in the Illinois Constitution that specifically prohibited a political party from having a majority on the State Board of Elections. No similar provision exists with respect to the composition of the Legislative Redistricting Commission. Finally, and, once again, most critically, the majority in *Walker* never considered any redeeming, legitimate legislative purpose for the Election Code's tie-breaking provision. Perhaps its silence on the issue is meant to imply it could find no such purpose. In any event, the justification for the tie-breaking provision of article IV,

§ 3(b), as articulated in the debates of the 1970 Illinois Constitutional Convention, is more than sufficient to pass rational basis review.

C. *Procedural Due Process*

In their joint response brief, the *Winters* plaintiffs and Philip intervenors try to frame the constitutionality of the tie-breaking provision in terms of procedural due process. When a state deprives an individual of a protected liberty or property interest, procedural due process generally guarantees the right to fair procedures, such as adequate notice, an opportunity to be heard, and an impartial decision maker. *See Head v. Chicago Sch. Reform Bd. of Tr.*, 225 F.3d 794, 803-04 (7th Cir.2000). The court fails to see how the tie-breaking provision implicates these concerns. In the first place, the *Winters* plaintiffs and Philip intervenors have never suggested what liberty or property interest the tie-breaking provision supposedly deprived them of. And while the manner of selecting the ninth Commission member may indeed be arbitrary, based as it is on chance (although the court stresses again the idea behind it is *not* arbitrary), this is a separate and distinct issue from whether the procedures used and decisions reached by the Commission are themselves arbitrary or unfair. Procedural due process is concerned with the latter, not the former.

Apparently recognizing this, the Winters plaintiffs and Philip intervenors claim the Commission, with the Democrats gaining control after this year's tie-breaker, has rode roughshod over the Republican minority and ignored all sorts of procedural requirements and internal rules, leading to a final reapportionment map that is the product of a hurried and one-sided decision-making process. However, this is not what the *Winters* and *Barnow* complaints allege and is not what these cases are about. The *Winters* plaintiffs and Philip intervenors proved this very point when they moved to amend the *Winters* complaint to add these new allegations on the day

of oral argument (a motion the court has already denied). In fact, similar allegations form part of an entirely new law suit filed in this court on October 12, 2001, in which the plaintiffs are represented by the same attorneys representing the Winters plaintiffs and Philip intervenors. *See Campuzano v. Illinois State Boardof Elections,* No. 01 C 50376. Therefore, the court considers the procedural due process argument a non-issue and need address it no further.

D. *Equal Protection*

In rather summary fashion, the *Winters* plaintiffs and Philip intervenors challenge the tie-breaking provision on equal protection grounds. This argument also merits little discussion. Put simply, the Equal Protection Clause does not apply in the first instance because the tie-breaking provision does not create any sort of classification whatsoever. Instead, it treats both political parties exactly the same and singles neither party out for disparate treatment. The two candidates chosen by the Supreme Court to be used in the drawing may not be of the same political party and each candidate's name is thrown into the hat only once, so each party stands an equal chance of winning (or losing) the drawing. As a result, the tie-breaking provision does not fall disproportionately on any discrete political party or otherwise afford unequal treatment to different political parties. *See Rodriguez,* 457 U.S. at 10, 12; *cf. Weisberg v. Powell,* 417 F.2d 388, 394 (7th Cir.1969) (requiring selection by lot to determine the order of placing names on a ballot to *avoid* equal protection violation); *Mann v. Powell,* 333 F.Supp. 1261, 1267 (N.D.Ill.1969) (same).

IV. CONCLUSION

For the reasons stated above, the court finds the tie-breaking provision of article IV, § 3(b) of the Illinois Constitution does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment of the

United States Constitution. It accordingly grants the motions for judgment on the pleadings by defendants in the *Winters* and *Barnow* cases and defendant-intervenor Tully, and denies the motions for judgment on the pleadings by the Winters plaintiffs and Philip intervenors and Barnow. This also means, as noted in the court's oral ruling and previous minute orders, all other issues and claims raised by the parties in these cases are rendered moot.

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

[Filed Oct 10, 2001]

Case No. 01 C 50229

WINTERS, *et al.*,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

MOTION

Motion by plaintiffs WINTERS *et al.* and plaintiff-intervenors PHILIP *et al.* for leave to file second-amended complaint and to alter or amend the judgment under Rule 59(e).

DOCKET ENTRY

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ☐ Ruling/Hearing on ____ set for ____ at ____.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on ____ set for ____ at ____.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on ____ set for ____ at ____.

(7) ☐ Trial [set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to ____ at ____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to] ☐FRCP4(m) ☐General Rule 21 ☐FRCP41(a)(1) ☐FRCP41(a)(2).

(10) ■ [Other docket entry] For the reasons stated on the reverse Memorandum Opinion and Order, the motions by plaintiffs Winters *et al.* and plaintiffs-intervenors Philip *et al.* to file an amended complaint under Rule 15(a) and to alter or amend the judgment under Rule 59(e) are denied.

(11) ■ [For further detail see order in the reverse side of the original minute order.]

MEMORANDUM OPINION AND ORDER

On September 28, 2001, plaintiffs Winters *et al.* and plaintiff-intervenors Philip *et al.* (collectively referred to as "plaintiffs") filed a motion for leave to file a second-amended complaint under Federal Rule of Civil Procedure 15(a). On October 9, 2001, the court received separate responses to this motion by defendant-intervenor Tully and the League of United Latin American Citizens. Plaintiffs' motion for leave to file an amended complaint is denied because the case had already been decided on cross-motions for judgment on the pleadings on September 28, 2001, and a final order, dismissing the case in its entirety, entered on October 1, 2001, all prior to plaintiffs presenting their motion to the court on October 3, 2001, under Local Rule 5.3. *See Camp v. Gregory*, 67 F.3d 1286, 1289-90 (7th Cir. 1995) (holding district court loses jurisdiction to entertain motion for leave to amend complaint once final judgment is entered unless plaintiff also moves for relief from judgment), *cert. denied*, 517 U.S. 1244 (1996).

Perhaps recognizing that the proper course for a plaintiff seeking to amend his complaint once judgment has been entered is to first have the judgment reopened under either Rule 59(e) or 60(b), *see Vicom, Inc. v. Harbridge Merch. Serv., Inc.*, 20 F.3d 771, 784-85 (7th Cir. 1994), plaintiffs filed, on October 9, 2001, a motion under Rule 59(e) to alter or amend the judgment. This motion has been noticed for presentment on October 17, 2001. To succeed in a Rule 59(e), the movant must bring to the district court's attention a manifest error of law and fact, or newly discovered evidence. *See Bordelon v. Chicago Sch. Reform Bd. of Tr.*, 233 F.3d 524, 529 (7th Cir. 2000). In this case, plaintiffs claim the purpose of their Rule 59(e) motion is to raise "new allegations based upon newly discovered evidence." (Pl's Mot. to Amend J. ¶ 7) After examining plaintiffs' proposed second-amended complaint, however, it is clear the "newly discovered evidence" plaintiffs point to does not affect the court's decision on the issues already briefed and argued in the cross-motions for judgment on the pleadings. Instead, the "new evidence" is used only for the purpose of adding new and separate claims to the complaint. This, in the court's opinion, does not warrant granting the Rule 59(e) motion.

For the reasons stated above, plaintiffs' motion for leave to file an amended complaint under Rule 15(a) is denied and plaintiff's motion to alter or amend the judgment under Rule 59(e) is also denied.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Western Division

[Filed Oct. 1, 2001]

Case Number 01- C 50229

DAVID WINTERS, *et al.*

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment on the pleadings is granted on motions by defendant Illinois State Board of Elections, *et al.*, and defendant-intervenor John Tully, and is denied on motions by plaintiff David Winters, *et al.*, and plaintiff-intervenor James "Pate" Philip, *et al.* The tie-breaking provisions of article IV, section 3(b) of the Illinois Constitution is found not violative of the equal protection or due process clauses of the Fourteenth Amendment of the United States Constitution or the due process clause of the Illinois Constitution. All other issues and claims by these parties and intervenor League of United Latin American Citizens are dismissed as moot. Due to the necessity of an immediate decision because of the

ongoing redistricting process by the Illinois Legislative Redistricting Commission, this order is final and appealable today and a written opinion will follow in due course. This case is hereby dismissed.

Michael W. Dobbins,
Clerk of Court

/s/ Susan M. Wessman
SUSAN M. WESSMAN
Deputy Clerk

Date: 10/1/2001

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

[Filed Nov. 27 2001]

Civil Action No. C 50229

DAVID WINTERS, PATRICIA REID LINDNER, J. BRADLEY BURZYNSKI, YOLANDA CAMPUZANO, ARMANDO CADENAS, GUADALUPE GARCIA and WILLIE JORDAN, JR., registered
Plaintiffs,

JAMES 'PATE' PHILIP and LEE A. DANIELS,
Intervenor Plaintiffs,

UNITED LATIN American CITIZENS,
Intervenor Plaintiff,

v.

ILLINOIS STATE BOARD of ELECTIONS and RONALD D. MICHAELSON, in his capacity as Executive Director of the Illinois State Board of Elections,
Defendants,

JOHN F. TULLY, JR.,
Movant.

Judge Michael S. Kanne, Terence T. Evans, and Philip G. Reinhard sitting as a three judge district court pursuant to 28 U.S.C. § 2284(b).

NOTICE OF DIRECT APPEAL
TO THE UNITED STATES SUPREME COURT

NOTICE OF APPEAL

Plaintiffs David Winters, Patricia Reid Lindner, Bradley Burzynski, Yolanda Campuzano, Armando Cardenas, Guadalupe Garcia and Willie Jordan, Jr. (the "Winters Plaintiffs"), and Intervenors James 'Pate' Philip and Lee A. Daniels hereby appeal the judgment of the United States three-judge district court announced from the bench on September 28, 2001 and entered on October 1, 2001.

On September 28, 2001, the three judge-district court issued an oral ruling denying the Motion for Judgement on the Pleading of David Winters *et al.*, and Intervenors James 'Pate' Philip and Lee A. Daniels, and granting judment on the pleading in favor of the Illinois State Board of Elections *et al.*, and Movant John Tully. The judgment was entered on October 1, 2001. The ruling and judgment found the tie-breaker provision of Article IV, Section 3(b) of the Illinois Constitution did not violate the equal protection or due process clauses of the Fourteenth Amendement of the United States Consitiution or the due process clause of the Illinois Constitution. The Winters Plaintiffs and Intervenors Philip and Daniels appeal from this judgment.

This Notice of Appeal is taken under 28 U.S.C. §§ 1253, 2201, and 2284, and under Rule 18 of the United States Supreme Court Rules.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing Notice of Appeal was served via messenger on the 27th day of November 2001 on the following:

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APPENDIX E

CONSTITUTION OF THE STATE OF ILLINOIS
ARTICLE IV. THE LEGISLATURE

IL CONST Art. 4, § 3

§ 3. Legislative Redistricting

(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.

(b) In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party.

The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly.

The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission.

Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.

Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

An approved redistricting plan filed with the Secretary of State shall be presumed valid, shall have the force and effect of law and shall be published promptly by the Secretary of State.

The Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate, which shall be initiated in the name of the People of the State by the Attorney General.

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV—CITIZENSHIP; PRIVILEGE AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any electin for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member or any State legislature, or as an exevutive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emacipation of any slave; but all such debts, obligations and claims shall be held illegal and void

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

REPORT

of

THE REDISTRICTING PROCESS REVIEW COMMISSION

January 8, 1999

REPORT OF REDISTRICTING PROCESS REVIEW COMMISSION

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I. Executive Summary

The state legislative redistricting provision of the Illinois Constitution of 1970 has not worked as intended. Delegates to the Constitutional Convention believed the threat of random selection of a partisan, tie-breaking member for a redistricting Commission would induce members of the General Assembly to agree on a redistricting map. But in both 1981 and 1991, the process failed to work as intended. The Secretary of State was required to draw (from a hat in 1981 and, in 1991, a crystal bowl) one of two names provided by the state Supreme Court to serve as a partisan tie breaker, to the widespread derision of the media and public, which depicted the process as "democracy by lottery." In addition, the failure of the process has led to lengthy court proceedings, the expenditure of millions of dollars on attorneys and redistricting consultants, and on both occasions has led to a last minute certification of election ballots.

In 1992, Secretary of State George H. Ryan created a Redistricting Process Review Commission, to which he appointed a bipartisan panel of former legislative leaders, academics and civic leaders. The Secretary directed the Commission to report its recommendations prior to the end of his term of office, in January, 1999, so the Report could be considered and acted upon in advance of the redistricting process that follows the decennial census of the Year 2000. Jeffrey R. Ladd, a lawyer and delegate to the Constitutional Convention of 1970, chaired the Commission.

The Commission held hearings throughout the state and developed principles to guide its work. These included the principle that the redistricting process should give the General Assembly the first opportunity to redistrict itself in a timely fashion. If the legislature is unable to adopt redistricting maps, then the subsequent' process should be as non-partisan as possible. In addition, the criteria for redistricting for each district should achieve contiguity, substantial equality of

population, and compactness. In addition, redistricting should reflect appropriate concern for minority representation, and minimize the number of underlying governmental units that are divided among state legislative districts.

After twenty-five meetings of the Commission, which included testimony by leading national experts on redistricting, the Commission has recommended to the Secretary of State a proposal to replace the present procedures with a new section for the Illinois Constitution that would fulfill these principles and criteria, as follow.

Each legislative chamber would be allowed to redistrict itself by resolution adopted in that chamber bar not less than a three-fifths vote. Should one or both chambers fail, then the responsibility for redistricting is transferred to the Illinois State Board of Elections, That board shall select specifications for a computer program that would redistrict the state's population according to prescribed criteria. The General Assembly shall have authority, by resolution of three-fifths of its members, to replace those computer specifications with its own, which would also have to meet the criteria stated in the Constitution. Otherwise, the specifications of the State Board would be applied to a computer program, which would draw separate redistricting plans one for the House of Representatives and one for the Senate—to be certified by the State Board.

This proposal eliminates "democracy by lottery." The proposal also provides the General Assembly the opportunity to redistrict itself removes the executive branch from involvement in the process, and provides a fail-safe mechanism that is scrupulously fair to all the citizens of our state. The Commission encourages members of the General Assembly to give this proposal their full consideration, in hopes that the proposed amendments to the Illinois Constitution will be presented to the voters in the fall election

of 2000 for ratification of this new procedure that would enhance public confidence in our democratic process.

II. Introduction

Redistricting is the process by which legislative boundaries are redrawn every ten years (following the release of the decennial census data) to reflect shifts in the population. The process is supposed to provide for equal representation in the state legislature commensurate with population changes.

Like many states, Illinois has had a long and frustrating experience with redistricting. In 1964 the General Assembly was unable to agree on a redistricting map. The result of the political impasse was that legislators were elected at-large in Illinois. The ballot used in that election became known as the "bed sheet ballot" because of its length.

In the wake of the wide spread public and political dissatisfaction with this process, the Sixth Illinois Constitutional Convention convened. Its members were dedicated to avoiding any further legislative elections on a statewide basis.

The Legislative Committee of the Convention, and most of the Convention delegates believed that the legislature should have the opportunity to redistrict itself and that this belief was central to the separation of powers doctrine. However, the issue was how to avoid an impasse and, if one occurred, how to resolve it.

Generally, the delegates felt that if the General Assembly could not agree on a redistricting map, the appointment of four non-legislators to a legislative redistricting commission would bring some objectivity to the process and facilitate communication and agreement. However, there would still be a need for a tie breaker in the event the commission phase still resulted in impasse. Hence the large majority of delegates felt that a winner take all tie-breaker process would not only

ensure some finality to the process, but also would sufficiently incentivize the General Assembly to reach a consensus to avoid the winner take-all effects of the tie-breaker. The Constitution of the State of Illinois was adopted by popular vote at the 1970 general election.

The first redistricting under the new constitution was in 1971. The 1971 General Assembly was almost equally divided between the two major parties. The House had a slight Republican majority, and the Senate was evenly divided between the parties. The General Assembly could not agree to a redistricting map, and the task was turned over to the Legislative Redistricting Commission, appointed by the legislative leaders. With bipartisan cooperation, the Commission managed to draw new districts that provided for legislative representation for the next ten years.

The General Assembly next faced the redistricting task in 1981, following the 1980 census. Complicating the task was adoption of the "cut back" constitutional amendment in 1980. This amendment reduced the size of the House by one third, and provided for single member districts, which eliminated the unique Illinois method of electing representatives by cumulative voting.

Leadership in the 1981 General Assembly was divided, with the Democrats having a majority in the Senate, and the Republicans a majority in the House. Not unexpectedly, the legislature did not agree on a new map, and the legislative leaders appointed a Legislative Redistricting Commission as provided in the 1970 Constitution. Because the bipartisan Commission could not agree on a new map, the "tie breaker" provision of the new constitution was utilized for the first time.

As provided by the Constitution the Supreme Court submitted the name of former Governor Richard Ogilvie, a Republican, and former Governor Samuel Shapiro, a Democrat. In a public ceremony, Secretary of State Jim

Edgar, a Republican, using an Abraham Lincoln hat, drew the name of Democrat Shapiro as the ninth member of the Commission.

With a Democratic majority, the Democrats drew a map favorable to themselves. The map was challenged in federal and state courts. The Illinois Supreme Court upheld the map with one modification. Blacks, Hispanics and Republicans challenged the map in federal court, and that court ordered changes made in some minority districts. The 1981 map was the law of the state until 1991.

Democrats controlled both houses of the General Assembly in 1991. The legislature approved a redistricting map and sent it to the Governor. Republican Jim Edgar vetoed the map, and the legislature was unable to override the veto. Again, a bipartisan Redistricting Commission was appointed by the legislative leaders. The Commission became deadlocked, and the "tie breaker" provision was activated again.

Before selecting the name, Secretary Ryan made it clear he found the process distasteful. "The people of Illinois deserve better, and they deserve representation that is not a lottery. The whole point of the legislative process is to achieve compromise. The legislature cannot just flip a coin or draw a name every time they are forced to make a tough decision."

The Supreme Court selected the two potential "tie breakers," Albert Jourdan, chairman of the State Republican Party, and former Democratic Supreme Court Justice Daniel Ward. Secretary of State George Ryan selected the name of Jourdan out of a crystal bowl. With a Republican majority, the Redistricting Commission adopted a Republican map.

The map was challenged in the State Supreme Court. On a 4-3 party line vote, the Court issued an order that invalidated the map and remanded it to the Redistricting Commission. That Commission made some slight changes in its map and resubmitted it to the Court. This time, however, one of the

judges switched sides and voted with the minority to uphold the map. The partisan nature of the switch was spelled out in a dissent filed when the final approval was appealed. With this partisan action of the court, the 1991 redistricting was concluded.

As indicated by this very brief history of redistricting in Illinois, redistricting is one of the most partisan actions that the legislature is asked to undertake. Legislators empowered to make the decisions are intent upon producing districts that will make it easiest for them to be re-elected, for their party to gain the maximum advantage, and for incumbents in both parties to remain in office. Subject to occasional other considerations, that is usually the order of priority. Redistricting has been a collective demonstration of unvarnished self-interest in action.

It was in this context that Secretary of State George H. Ryan announced on March 3, 1992 the appointment of 29 people to a bipartisan Redistricting Process Review Commission to consider reforms in Illinois' procedures for re-mapping legislative districts every ten years. He thereby fulfilled the commitment he had made the previous September, minutes before selecting the tie-breaking ninth member of the Legislative Redistricting Commission, when he said he would create a group of experts and interested parties to examine alternatives for breaking future deadlocks on the redistricting panel.

He initially appointed;

Joseph Berrios
Ertharin Cousin
John Dailey
Rep. Lee Daniels
Samuel Gove
Paul Green
John Jackson
James Nowlan
Sen. James "Pate" Philip
Sylvia Puente
David Reed
Dennis Rendleman
Eleanor Revelle
Sen. Philip Rock

John Kornacki	Howard Ryan
Jeffrey R. Ladd	Gerald Shea
Michael Lavelle	Zack Stamp
Tracy Litsey	Joseph Tecson
Ann Lousin	Jack Van Der Slik
Rep. Michael Madigan	Daniel Ward
Pam McDonough	W. Edward Webb

Donald Zeglis

Later in the process, due to death, relocation, change in employment, or resignation, John Kornacki, Tracey Litsey, John Dailey, Sylvia Puente, David Reed, Eleanor Revelle, Daniel Ward and Don Zeglis ceased to participate on the Commission. Secretary Ryan then proceeded to appoint Sen. Emil Jones, as the minority leader of the Illinois Senate, Robert W. Blair, former speaker of the House of Representatives, and Jan Flapan, president of the League of Women Voters, as replacements.

The Commission initially attempted to obtain funding from several foundations headquartered in Chicago. None felt that this effort was within their mission or consistent with their goals and objectives. As a result the budget for this effort was drastically reduced, and the limited funding required was supplied by the Secretary of State's Office.

The Commission held a series of public meetings in Chicago, Springfield, Edwardsville, Moline, Bloomington, Carbondale and Glen-Ellyn. The meetings were held to solicit public input regarding the process and the potential for change. Members of the Commission were also provided with what some regarded as an overwhelming volume of information regarding redistricting in Illinois and other states. In addition, the Commission received testimony from several nationally recognized experts on redistricting. (*See*, "Papers of the Redistricting Process Review Commission," on file in the Office of the Secretary of State, Springfield.)

Early in its deliberations, the Commission formulated a set of criteria against which any proposal could be measured. Each proposal was evaluated on whether it:

1. Engendered Public Trust.
2. Finalized district boundaries in a timely fashion.
3. Provided for meaningful public participation.
4. Minimized partisan domination of the process.
5. Minimized the partisan windfall effect.
6. Avoided obstructing the business of the Legislature.

However, in trying to construct a solution that would meet the criteria and which would be workable, the Commission spent a great deal of time attempting to identify as a tie-breaker an individual(s) or institution(s) that was not only perceived to be independent, non-partisan and objective, but indeed embodied those characteristics. It became painstakingly clear that no such person, active or retired, or institution was so perceived. In no small part the perception stems from the fact that Illinois is very evenly divided—Republican and Democrat. It is a very partisan state. In fact it is considered a bell-weather state in national elections. Its bruising and sophisticated political system has produced a disproportionate share of Congressional leaders, including the current Speaker of the U.S. House of Representatives. Names like Dirksen, Cannon and Rainey are numbered among historic Illinois powerhouses on the Congressional scene because of the finely honed political skills they acquired in this prairie state.

Nevertheless, as time consuming and as difficult as it was, the members of the Commission now believe they have fashioned a process that breaks deadlocks in a non-partisan, fair and timely manner and which will avoid the expenditure of large sums of money for attorney fees and redistricting

consultants. The solution will also serve to avoid the late certification of ballots, which must await final approval of legislative boundaries.

III. Alternative Proposals Considered by the Commission

In response to the charge given the Commission by the Secretary of State, eight proposals, and variants thereto, were proposed by and considered by members of the Commission. These proposals are summarized briefly here, so the reader can appreciate the wide range of possibilities considered.

1. Rather than add a tie-breaking member to the Redistricting Commission, as required by the Illinois Constitution of 1970, this proposal would remove one of the members of the by random selection. The party with the majority on the would then choose to draw the map for one of the legislative chambers, while the party in the minority would draw the map for the other chamber.

2. This proposal would advance the deadlines for the General Assembly action on redistricting by several months to accommodate election officials. The current procedure of selecting a ninth member of the Redistricting Commission would be continued; however, each of the two names submitted by the Supreme Court would participate in the redistricting process. The first person whose name was drawn by the Secretary of State would then in turn draw out the name of one of the two chambers, and that person would serve as the ninth member of the Redistricting Commission for purposes of redistricting that chamber. The other person submitted by the Supreme Court would then serve as the ninth member of the Redistricting Commission for purposes of redistricting the other chamber.

3. Membership on the Redistricting Commission would be expanded from the present eight to sixteen. The proposal

prohibits membership by members of the General Assembly or persons who would be candidates for the legislature in the first election following adoption of the redistricting.

4. The tie breaking ninth member of the Redistricting Commission would be elected at the general election preceding redistricting. This would put legislators on notice as to which party would control the redistricting process, should the General Assembly fail to redistrict itself.

5. This proposal comprises a number of general recommendations for overhauling the existing procedure. The most dramatic of these suggestions would transfer responsibility for redistricting to a body independent of the General Assembly, such as the Legislative Reference Bureau or the State Board of Elections, and that redistricting would be accomplished by computer, based upon objective, nonpartisan criteria.

6. This proposal would incorporate some form of the tie-breaking provisions found in Hawaii, New Jersey and Pennsylvania, where a majority of the redistricting commission itself selects the tie-breaking member.

7. In this proposal, the four legislative leaders (President of the Senate and Minority Leader; Speaker of the House and Minority Leader) would constitute the Commission on Redistricting and be responsible in the first instance for redistricting. If the Commission fails to submit a final redistricting map to the Secretary of State by July 1st signed by at least three of the four members, then one of the members, chosen by lot, shall be removed from the Redistricting Commission. The three remaining members would have until August lst to agree on redistricting maps, signed by at least two members of the Redistricting Commission.

8. The eighth and final proposal is the one ultimately recommended by this Commission, and it is discussed and supported in detail in the section that follows. The proposal

incorporates and refines several of the general recommendations made in proposal Number 5 above, to wit; If the General Assembly proves unable to redistrict itself, then the responsibility is delegated to the Illinois State Board of Elections. The State Board of Election shall have responsibility for selecting specifications for a computer program that shall draw redistricting maps consistent with State and Federal law.

This proposal was selected by the Commission in large part because of the public aversion to any form of lottery selection of a tie-breaking commission member. Further, the bipartisan membership of the Commission believes that—even in a political system as highly partisan as that in Illinois—it is possible, indeed incumbent upon elected policymakers, to design a procedure that is neutral and fair to all its citizens.

IV. Issues and Recommendations

The Commission's approach was to identify any issues of concern [1] in Article IV of the Constitution and, wherever a problem was identified, search for solutions and, where possible, advance a recommendation. This was done in each instance but one. That exception involves judicial review by the Illinois Supreme Court. Under the existing Constitution, the Supreme Court has exclusive and original jurisdiction over conflicts involving a redistricting plan. Nevertheless, some problems are created by judicial review. Therefore, limiting or eliminating court jurisdiction was considered. However, there was no consensus on the Commission to change the role of the Supreme Court.

The recommendations are based upon certain factual and legal premises which follow. The Republican and Democratic

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[1] Where the Commission members of this report observe a consensus opinion on any point, it is intended only to reflect the plurality of those opining. Minority opinions are not reflected.

parties are equally competitive on a statewide basis.[2] With a fair map, control of either chamber of the General Assembly is dependent upon superiority in traditional components of political success. In most elections, less than 20% of the seats in either chamber are seriously contested. Thus, while agreement between the parties could be reached in 80% of the districts, the parties have been unable in the past two redistricting cycles to reach overall agreement. Thus, the last two plans were drawn by the Redistricting Commission after utilizing the tie-breaker provision. These plans were later scrutinized by the courts.[3]

The systemic failure of existing redistricting concepts embodied in Article IV are twofold: (a) obstacles to success at the legislative level; and (b) displeasure with the safety net.

The obstacles to implementation of a General Assembly passed map are also multiple in category. At present, a map must not only be approved in both chambers, it must satisfy the complex political equation resulting from "nesting." This requires satisfying not only both parties within that chamber, but the concurrence of members of both parties of the opposite chamber. The Governor must then sign the

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[2] In statewide elections (i.e. state constitutional officers and United States Senators) since 1968, Republicans have won thirty-three offices and Democrats thirty.

[3] In 1981, the redistricting plan was passed only after the "tie-breaker" was utilized. Illinois Supreme Court later held one of the Representative Districts unconstitutional due to a population deviation. *Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 430 N.E.2d 483, 491-92 (1981). Again in 1991, the "tie breaker" had to be utilized. This map was also challenged. Only after two Illinois Supreme Court decisions and over two million dollars spent was a map finally approved. *People ex rel. Burris v. Ryan*, 147 Ill.2d 770, 558 N.E.2d 1033,1035-36 (1992) *cert. denied*, 504 U.S. 973 (1992). Interestingly, from 1901 to the present, "the Illinois General Assembly has approved only one legislature redistricting map under which an election has been held. *Grivetti v. Illinois State Electoral Bd.*, 335 F.Supp. 779, 790 (N.D. Ill. 1971).

submittal. Failure to get approval from the other chamber and the Governor of a "nested" map were viewed by the Commission as significant obstacles in passing and implementing a redistricting map. Any plan (whether created by the legislature or the Commission) is then the object of scrutiny by the Attorney General and the Illinois Supreme Court.

V. Legislative Passed Maps

The Commission members felt further strain upon the process was placed by requiring that the Governor and both chambers must approve any legislative plan. Unless both chambers and the governorship are controlled by the same party, the Commission members felt the risk of failing to pass a redistricting map was great. It was felt that bipartisan support of any plan was both desirable and essential to withstand public claims (and judicial inquiry) as to political gerrymandering. However, given other obstacles, bipartisan support under the present system is unlikely. Without the constraints imposed by having the other chamber's approval and the Governor's acquiescence, well-informed views were expressed that each chamber had a good possibility of achieving a 3/5 agreement on a map governing *only* that chamber. Such a majority would require bipartisan support. However, it would not require approval of the other chamber, or the governor.

The Commission members felt a super-majority was essential to achieve the desired goal of bipartisanship Two super-majority requirements were considered: 3/5 and 2/3. Only once since the 1970 Constitution was adopted has a party achieved a 3/5 majority in either chamber—and then not in a year in which redistricting was required.[4] A 3/5 margin would require a Senate vote of 36 and a House approval of 72. A 2/3 majority would ensure greater

[4] In the eighty-seventh General Assembly, the Democrats held a majority in the House of slightly more than three-fifths.

participation of the minority party requiring a Senate vote of 40 and a House vote of 79. However, a 2/3 requirement was viewed by the Commission members as unattainable and otherwise would allow a 1/3 minority to hold a fair plan hostage.

These recommendations are not only an attempt to minimize oversight by co-equal branches but also to minimize internecine fighting between House and Senate map drawers of the respective parties. While nesting provisions requiring that each Senate District have boundaries co-terminus with two enclosed House districts do promote some efficiency for the County Clerks, it was felt such gains were outweighed by the possibilities for disorder created by superimposing the maps of each Chamber upon each other as a condition of approval. The Commission members felt that elimination of this provision would greatly increase the possibility of passage of a bipartisan map—even with the requirement of a three-fifths majority vote.

VI. Redistricting Commission Maps

The Redistricting Commission is by law initially constituted in political equality, with equal representation from each party. For that reason alone, it faces great obstacles to breaking any legislative stalemate. Without either party possessing a majority, the Redistricting Commission is called upon to do what the General Assembly" [5] (whose members it represents) could not accomplish. If unable to act its the eight person configuration, the Redistricting Commission then goes into the "tie-breaking" phase where, by random selection of

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[5] "The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly." ILL. CONST. art IV, § 3(b).

an additional member, one party gets the upper hand and draws the redistricting plan.[6] The winner of this lottery obtains political advantage which is, however, still subject to agreement between the chambers on the "nested" boundaries, scrutiny by the Attorney General and subject to the jurisdiction of the Supreme Court.[7]

The perceived unlikelihood of a Redistricting Commission drawing an acceptable map and the further inevitability that it would be drawn only after the tie-breaking spectacle unique to Illinois, were the primary bases of the Commission's recommendation for reform. This tie breaking provision has been the object of much media attack,[8] and its

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[6] "If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1." ILL. CONST. art IV, § 3(b) "No later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission." ILL. CONST. art IV, § 3(b).

[7] ILL. CONST, art III, § 3(b). "After all of the deliberations and expense to the taxpayers, over $2 million, we do not find that a lottery or a flip of a coin is in the best interest of anyone except the part which has won the toss." *People ex rel Burns v. Ryan*, 147 ILL>2d 270, 588 N.E.2d 1033, 1038-39 (1992), *cert. denied*, 504 U.S. 973 (1992) "It appears to the Court that involvement in the apportionment of districts at the behest of one political party (and obviously to the detriment of another political party) would undoubtedly involve the Court's involvement in future requests to examine district lines by a second, a third, or perhaps numerous political parties. It is not for the Court to decide which political party should be in power during any given election year." *Smith v. Boyle*, 959 F.Supp. 982, 989 (C.D. Ill. 1997), *aff'd as modified*, 144 F.3d 1060 (7th Cir. 1998).

[8] Quirk, *Avoiding government by lottery*), CHI. TRIB., March 19, 1992; Pearson, *Ryan looks for better way to redistrict state*, CHI. TRIB., March 3,1992; *New rules for Illinois' Mapmapers*, CHI. TRIB., March 3, 1992: Grady, *Must remaps be just a matter of simple luck?*, CHI. TRIB., January 19, 199.

constitutionality has even been placed in question by the Supreme Court.[9] The Commission members recognized that any solution to the elimination of the tie-breaking provision involved eliminating the Redistricting Commission which needs the tie-breaker to act. The Redistricting Commission concept, while well-intentioned, has not broken legislative impasse, and the political dynamics seem to indicate that, absent constitutional change, history will indeed repeat itself with future maps again drawn by winners of a lottery.

VII. Recommendations—Overview

It was the Commission's initial objective to create an environment which would encourage passage of a plan by each chamber for that chamber only. In the event either chamber is unable to pass a legislative plan, it was the consensus that a neutral computer-governed format should be substituted for the Redistricting Commission. This would take advantage of technical computer capacities not available to the framers of the 1970 Constitution. The format advanced by this Commission would give incentive to the General Assembly to act and eliminate the foremost obstacles to success. While the basic computer tools have been utilized, no State has gone as far as does this recommendation.[10]

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[9] *People ex rel. Burns v. Ryan*, 147 Ill.2d 270, 558 N.E.2d 1033, 1043-44 (1992), *cert. denied*, 504 U.S. 973 (1992), (Justice Bilandic dissenting) ("the tie-breaking procedure set forth in article IV, section 3(b), of the Illinois constitution of 1970 violates the due process clause of the fourteenth amendment to the United States Constitution. Any redistricting plan produced as result of the tie-breaking procedure is therefore unconstitutional and invalid.")

[10] *See* Iowa Code §42.1 *et seq* (1998). On 1/21/97 Nebraska State Senator Curt Bromm introduced Legislative Bill 607, which provides specific, scientific standards and guidelines for a designated, disinterested third party and committee to use when drawing legislative and

Upon the recommendation, each chamber of the General Assembly would have until June 15 to pass a map for its own chamber. Such vote would be by a 3/5 vote, as opposed to the simple majority, now required. This would require bipartisan support. On the other hand, approval of the other chamber, satisfaction of nesting provisions and approval by the Governor (viewed as non-leislative involvement) would be eliminated.

Under the present system, failure of the General Assembly to pass a redistricting plan places the matter before the Redistricting Commission. Under the format envisioned by the Commission members, the Redistricting Commission's function as a safety net would be filled by the State Board of Elections. However, its functions would be ministerial only. The only function of the State Board would be to approve neutral criteria for a computer program prior to April 15th. If either chamber of the General Assembly is unable to approve a plan with a 3/5 vote, then the State Board would run the program generating the legislative map which would be applicable to the chamber(s) unable to agree on a map. Thus, each chamber has to engage in bipartisan creation of a map for itself or become subject to a map created by an impartial computer program. However, because the computer program has a randomly selected point of beginning, the map it would generate would be unknown. Thus, the General Assembly gets to choose between the map it knows and the map it

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congressional district boundaries. L.B. 607, 95th Leg., lst Reg. Sess. (Neb. 1997). On May 18, 1998 the 1998 Regular Session adjourned without carrying over L.B. 607. L.B. 607, 95th Leg., 2d Reg. Sess. (Neb. 1997).

On May 14, 1997 Texas State Senator Wentworth introduced S.J. Res. 41 and S. B. 1564 which proposed a constitutional amendment to create the Texas Redistricting Commission to establish legislative and congressional districts and to review the constitutional redistricting provisions. S. J. Res. 41 and S. B. 1564, 1st Reg. Sess. (Tex. 1997). The Regular Session adjourned on August 6, 1997 with no carryover.

doesn't know. The members of the Commission believe this may constitute a "tie breaker" which will prove to be a real incentive for bipartisan agreement.

To develop such computer software would require some pioneering, but it was the consensus of the Commission that a computer-driven decision tree can be developed. That decisional tree (reflected in lines 164-175) would provide a protocol for the computer to randomly begin and then draw what will be a large number of (a) contiguous districts; (b) containing equal population; (c) subject to compactness criteria; (d) minimizing City/County splits; (e) ensuring a fair reflection of minority voting strength; and (f) mathematical tie-breaking criteria, so as to select a single plan.

VIII. Recommended Computer Criteria

The Commission members felt that if the Redistricting Commission is replaced by computer randomness, that it must reflect Illinois traditional criteria, yet be sufficiently flexible to accommodate changes in interpretive law. This decisional tree follows that format. The principal tiers of that decisional tree follow;

**"CONTIGUITY" [11] This is the *sine qua non* of legislative representation of a geographic area. It merely requires that all territory touch some property within that same district. it is required in a legislative map whether generated by man or machine.

- **"SUBSTANTIAL EQUALITY OF POPULATION" [12] It is envisioned that any computer-generated map would

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[11] "Legislative and Representative Districts shall be contiguous. ILL. CONST. art IV, § 3(a).

[12] Legislative and Representative Districts shall be substantially equal in population. ILL. CONST. ART. iv, § 3(A). Variances from a pure population standard in state redistricting may be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the

be programmed to start randomly at a location and move randomly to assimilate contiguous geography until one district (whether House or Senate) with ideal population is drawn. At this level of the decision tree, the computer would be able to generate a large number of plans having equally populated districts,

**"COMPACTNESS" [13] The decision tree would then require that any overall map not having compactness criteria within certain limits be excluded. Compactness is highly rated by the Illinois Supreme Court in analyzing plans. In Schrage, compactness formed the prime element in the Courts decision. In the compactness of the Redistricing Commission map, *Burris* was viewed by the Court members with scrutiny. There is no single measure of compactness. Indeed, some 20 are reported in the literature. Three have emerged as the most often utilized. There is software for all three, and the Supreme Court analyzed data generated by those very three in judicially evaluating the last map.

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recognition of natural or historical boundaries. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). *See also People ex rel. Burris v. Ryan*, 147 Ill. ld 270, 588 N.E. 2d 1033, 1035 (1992), *cert. denied*, 504 U.S. 973 (1992) (1991 redistricting plan viewed by Illinois Supreme Court in light of whether it met requirement of substantially equal population").

[13] "Legislative and Representative Districts shall be compact. ILL. CONST. art. IV, § 3(a); *People ex rel Burris v. Ryan*, 147 Ill.2d 270, 588 N.E. 2d 033,1035-36 (1992), *cert. denied*, 504 U.S. 973 (1992) (majority opinion) (maps must satisfy compactness requirements); *Id.*, at 1038, (Justice Heiple concurrence states 1991 map met compactness standard even though drawn with unusual shapes); but see *Id.* at 1040-41, (Justice Clark's dissent stating that 1991 map does not meet compactness standard). *Schrage v. State Bd of Elections*, 88 Ill. 2d 87, 430 N.E. 2d 483, 485-89 (1981).

**"MINIMIZATION OF THE NUMBER OF DISTRICTS THAT CROSS COUNTRY OR MUNICIPAL BOUNDARIES" [14]—in its most recent pronouncements on legislative redistricting, the United States Supreme Court approved the concept of joining conventional communities of interest. it was the sense of the Commission members that because communities of interest are defined solely by geography, that this "wild card" element in the map drawing hand is best defined by quantifying county and municipality splits. Once accomplished, there could be a narrowing process of maps of contiguous geography, equality of population and within a range of acceptable compactness criteria by only selecting a preordained range of maps involving minimal county/municipality splits.

**"A FAIR REFLECTION OF MINORITY VOTING STRENGTH" [15]—in the last redistricting cycle,

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[14] While not constitutionally mandated, this state redistricting principle has often been recognized as a legitimate interest by the United States and Illinois Supreme Courts. *Miller v. Johnson*, 515 U. S. 900, 901 (1995); *Swann v. Adams*, 440, 444 (1967); *Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 430 N.E.2d 483, 488-89 (1981).

[15] In *Shaw v. Reno*, 509 U.S. 630, 657-58 (1993), the Supreme Court allowed a challenge to a redistricting plan intended to benefit a racial minority. In holding the plan unconstitutional, the Court stated that:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.

Id. at 657.

Later, the Supreme Court, while recognizing that reapportionment is primarily a state function, again applied a strict scrutiny analysis to a racial gerrymander intended to benefit a racial minority. *Miller v. Johnson*, 515 U.S. 900 (1995). In order to show an impermissible racial gerrymander, a plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of votes within or without a particular district. To make this showing, a plaintiff

compliance with the Voters Rights Act resulted in an attempt to generate a maximum number of majority minority districts, possessing minority super-majorities of between 50-65%.

A professor at the University of Baltimore has conducted research to generate the *maximum* number of such majority/minority districts with any given population data. This work, has as its object drawing the maximum number of districts—many of which would not satisfy the compactness, equal population and municipality split limitations of the envisioned format. A known quantitative objective greatly eases satisfaction of the Voting Rights Act and concomitant map drawing problems associated with attempts at maximizing the number of minority districts. As can be seen, this proposal anticipates multiple computer-driven steps to achieve a finite number of plans, all of which would achieve the aforementioned criteria. Selection of the plan actually implemented could be done by having the computer draw further tie-breaking criteria.

This recommendation contemplates the possibility that one chamber of the General Assembly might be unable to obtain the necessary 3/5 vote but desires to modify the computer program generated by the Election Commission. It is expected that such changes would be technical, nonpolitical and involve adjusting relationships between the various criteria. For instance, relaxing population deviations to

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must prove that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* at 916. Where race-related classifications are the basis for a particular map, and are not subordinated to race, a claim of impermissible racial gerrymandering can be defeated. *Id.* at 916. Even compliance with federal antidiscrimination laws cannot immunize racial gerrymandering.

increase compactness ratios or minority districts. Such substituted programs would retain prohibitions against political intervention.

Because any computer drafted map would be free from political influence and because *intent* to politically discriminate is essential to maintain a cause of action, it is expected that any computer-assisted plan would not only be politically fair, it would be free of judicial review possibilities.[16]

The Commission agreed that two other changes should be recommended for incorporation in any constitutional amendment. First the size of the House of Representatives should be increased by one member to avoid the possibility of an evenly divided legislative body unable to organize itself.

Secondly, the Commission members believed that while original and exclusive jurisdiction should remain in the Supreme Court, it should not be limited to application by the Attorney General. It is therefore recommended that that provision be deleted.

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[16] Under *Davis v. Bandemer*, 478 U.S. 109, 126, fn 11 (1986), a showing of discriminatory intent is a prerequisite to a political gerrymandering claim. *See also Smith v, Boyle*, 144 F.3d 1060, 1065-66 (7th Cir. 1998).

IX. Proposed Constitutional Amendment

91ST GENERAL ASSEMBLY

State of Illinois

1999 and 2000

HOUSE JOINT RESOLUTION

CONSTITUTIONAL AMENDMENT

INTRODUCED _____, BY

SYNOPSES AS INTRODUCED:

ILCON Art, IV, Sec. 1
ILCON Art. IV, Sec. 2
ILCON Art. IV, Sec, 3
ILCON Art, XIV, Sec. 1

Proposes to amend the Legislature Article of the Illinois Constitution. Provides that a Representative District (for election of a member of the House of Representatives) need not be entirely within a single Senatorial District (for election of a member of the Senate, now referred to as a Legislative District). Provides that (i) the Senate redistricts Senatorial Districts by resolution, adopted by a record vote of three-fifths of the members elected and (ii) the House of Representatives redistricts Representative Districts by resolution adopted by a record vote of three-fifths of the members elected (now, redistricting is by law). Eliminates the Legislative Redistricting Commission. Provides instead that if a Senatorial or Representative redistricting plan is not adopted by June 15 of the year following a federal decennial census year, then the State Board of Elections shall produce a redistricting plan using a computer program. Requires the State Board of Elections to designate its computer program by April 15. The computer program designated by the State Board of Elections must disregard specified data and must consider certain prioritized factors; the computer program

shall otherwise produce districts in a random manner. Authorizes the House and Senate to designate different computer programs for their respective chambers; doing so requires adoption of a resolution by a three-fifths vote on or before June 15. Removes the requirement that actions concerning redistricting the House or Senate may be initiated only by the Attorney General. Increases the number of Representatives from 118 to 119. Proposes to amend the Constitutional Revision Article to make a change to conform nomenclature. Effective beginning with redistricting in 2001 and applies to members elected in 2002 and thereafter.

SENATE JOINT RESOLUTION

CONSTITUTIONAL AMENDMENT

RESOLVED, BY THE SENATE OF THE NINETY-FIRST GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that there shall be submitted to the electors of the State for adoption or rejection at the general election next occurring at least 6 months after the adoption of this resolution a proposition to amend Sections 1, 2, and 3 of Article IV and Section 1 of Article XIV of the Illinois Constitution as follows:

ARTICLE IV

THE LEGISLATURE

(ILCON Art. IV, Sec. 1)

SECTION 1. LEGISLATURE—POWER AND STRUCTURE

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives elected by the electors from 59 *Senatorial* ~~legislative~~ Districts and *119* ~~118~~ Representative Districts.

(Source: Amendment adopted at general election November 4, 1980.)

(ILCON Art. IV, Sec. 2)

SECTION 2. LEGISLATIVE COMPOSITION

(a) One Senator shall be elected from each *Senatorial* ~~legislative~~ District. Immediately following each decennial redistricting, the General Assembly by law shall divide the *Senatorial* ~~legislative~~ Districts as equally as possible into three groups. Senators from one group shall be elected for terms of four years, four years and two years; Senators from the second group, for terms of four years, two years and four years; and Senators from the third group, for terms of two years, four years and four years. The *Senatorial* ~~legislative~~ Districts in each group shall be distributed substantially equally over the State.

(b) ~~Each legislative District shall be divided into two Represetative Districts. In 1982 and every two years thereafter~~ One Representative shall be elected from each Representative District for a term of two years.

(c) To be eligible to serve as a member of the General Assembly, a person must be a United States citizen, at least 21 years old, and for the two years preceding his election or appointment a resident of the district which he is to represent. In the general election following a redistricting, a candidate for the General Assembly may be elected from any district which contains a part of the district in which he resided at the time of the redistricting and reelected if a resident of the new district he represents for 18 months prior to reelection.

(d) Within thirty days after a vacancy occurs, it shall be filled by appointment as provided by law. If the vacancy is in a Senatorial office with more than twenty-eight months remaining in the term, the appointed Senator shall serve until the next general election, at which time a senator shall be elected to serve for the remainder of the term. If the vacancy is in a Representative office of in any other Senatorial office, the appointment shall be for the remainder of the term. An

appointee to fill a vacancy shall be a member of the same political party as the person he succeeds.

(e) No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity for time during which he is in attendance as a member of the General Assembly.

No member of the General Assembly during the term for which he was elected or appointed shall be appointed to a public office which shall have been created or the compensation for which shall have been increased by the General Assembly during that term.

(Source: Amendment adopted at general election November 4, 1980.)

(ILCON Art. IV, Sec. 3)

SECTION 3. LEGISLATIVE REDISTRICTING

(a) *Senatorial* ~~legislative~~ Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population. *A Representative District need not be entirely within a single Senatorial District.*

(b) By April 15 of the year following each Federal decennial census year, the State Board of Elections, by a record vote of a majority of the total number of members authorized by law as provided in Section 5 of Article III, shall designate a computer program for redistricting the Senate and House of Representatives that meets the requirements of this Section. The designation shall include detailed specifications of the computer program.

Any computer program designated by the State board of Elections under this Section shall embody, the following

standards and criteria, as defined by Common Law in this order of priority:

(1) contiguity;

(2) substantial equality of population;

(3) compactness,

(4) Minimization of the number of districts that cross county or municipal boundaries; and

(5) a fair reflection of minority voting strength. Any computer program designated by the State Board of Elections under this Section shall not consider the following data:

(1) resident of incumbent legislators;

(2) political affiliations of registered voters;

(3) previous election, results; and

(4) demographic information not required to be used by this Section or by the United States Constitution or federal law.

Except as specified in this Section, the computer program shall produce districts in a random manner.

The Senate, by resolution adopted by a record vote of three-fifths of the members elected, may by June 15 of that year designate a different computer program for redistricting the Senate. The House of Representatives, by a resolution adopted by a record vote of three-fifths of the members elected, may by June 15 of that year designate a different computer program for redistricting the House of Representatives.

(c) ~~(b)~~ In the year following each Federal decennial census year, *(i)* the *Senate, by resolution adopted by a record vote of three-fifths of the members elected,* ~~General Assembly by law~~ shall redistrict the *Senatorial* ~~legislative~~ Districts and *(ii)* the

House of Representatives, by resolution adopted by a record vote of three-fifths of the members elected, shall redistrict the Representative Districts. *Each adopted redistricting resolution shall be filed with the Secretary of State by the presiding officer of the house that adopted the resolution.*

(d) If a Senatorial or Representative redistricting resolution is not adopted and effective by June 15 of that year, the State Board of Elections, as soon thereafter as is practicable, shall produce a Senatorial or Representative redistricting plan, or both as the case may be, through the use of the computer program designated by the affected chamber, if it made a designation under subsection (b), or else through the use of the computer program designated by the State Board of Elections under that subsection. The State Board of Elections shall file the redistricting plan with the Secretary of State.

~~If no redistricting plan becomes effective by June 30 of that year, a legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party. The Speaker and minority leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly. The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission. Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.~~

~~If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.~~

~~Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.~~

~~Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.~~

(e) A ~~An approved~~ redistricting plan, *adopted by redistricting resolution or produced by the State Board of Elections, that is* filed with the Secretary of State shall be presumed valid, shall have the *same* force and effect *as a* ~~of~~ law, and shall be published promptly by the Secretary of State.

(f) The Supreme court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate~~, which shall be initiated in the name of the People of the State by the Attorney General~~.

(Source: Amendment adopted at general election November 4, 1980.)

ARTICLE XIV

CONSTITUTIONAL REVISION

(ILCON Art. XIV, Sec. 1)

SECTION 1. CONSTITUTIONAL CONVENTION

(a) Whenever three-fifths of the members elected to each house of the General Assembly so direct, the question of whether a Constitutional Convention should be called shall be submitted to the electors at the general election next occurring at least six months after such legislative direction.

(b) If the question of whether a Convention should be called is not submitted during any twenty-year period, the Secretary of State shall submit such question at the general election in the twentieth year following the last submission.

(c) The vote on whether to call a Convention shall be on a separate ballot. A Convention shall be called if approved by three-fifths of those voting on the question or a majority of those voting in the election.

(d) The General Assembly, at the session following approval by the electors, by law shall provide for the Convention and for the election of two delegates from each *Senatorial* ~~legislative~~ District; designate the time and place of the Convention's first meeting which shall be within three months after the election of delegates; fix and provide for the pay of delegates and officers; and provide for expenses necessarily incurred by the Convention.

(e) To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly. Vacancies shall be filled as provided by law.

(f) The Convention shall prepare such revision of or amendments to the Constitution as it deems necessary. Any proposed revision or amendments approved by a majority of the delegates elected shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment. Any revision or amendments proposed by the Convention shall be published with explanations, as the Convention provides, at least one month preceding the election.

(g) The vote on the proposed revision or amendments shall be on a separate ballot. Any proposed revision or amendments shall become effective, as the convention provides, if approved by a majority of those voting on the question.

(Source: Illinois Constitution.)

SCHEDULE

This Constitutional Amendment takes effect beginning with redistricting in 2001 and applies to the election of members of the General Assembly in 2002 and thereafter.

Supreme Court U.S.
FILED
MAR 1 2002
OFFICE OF THE CLERK

No. 01-1114

In the

Supreme Court of the United States

DAVID WINTERS, *et al.*,

Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

On Direct Appeal From The Three-Judge Panel In The United States District Court For The Northern District of Illinois

MOTION TO AFFIRM

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2 *Moore's Federal Practice* §12.38,
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MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees Illinois State Board of Elections and its Executive Director Ronald D. Michaelson ("State Appellees") move to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision on the cause depends are so unsubstantial as to need no further argument. The decision entered on the merits below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF FACTS

This case involves the constitutionality of the random selection procedure for breaking deadlocks on the Illinois Legislative Redistricting Commission, as provided for in section 3(b) of article IV of the Illinois Constitution of 1970. The provision under attack is set forth at pages 24a-25a of the Jurisdictional Statement. The trial court, per a three-judge panel, upheld the validity of the provision. Its opinion is set forth at pages 1a-14a of the Jurisdictional Statement.

The case was decided in the trial court pursuant to the State Appellees' and intervening defendants' motions for judgment on the pleadings. (Jurisdictional Statement 13a-14a.) The Appellants therefore base the underlying "facts" recited in their Jurisdictional Statement on the allegations set forth in their Amended Complaint. Essentially, the Amended Complaint alleges that the apportionment map for the election of Illinois legislators needs to be redrawn; that section 3(b) of article IV of the Illinois Constitution sets forth the procedure for redrawing the map; that the procedure contemplates that, first, the Illinois General Assembly attempt to redraw it, but

if it is not successful in doing so, then a Commission consisting of four Democrats and four Republicans be appointed to do so; and that if the equally-divided Commission is not able to agree on the new map, then a ninth member be randomly selected to break the deadlock. The Amended Complaint claims that the random selection of the ninth member is a violation of equal protection and due process rights.

Because factual allegations are typically accepted as true on a motion for judgment on the pleadings, the State Appellees do not quarrel with the facts described in the Jurisdictional Statement for purposes of this appeal. Even on such a motion, however, this Court need not ignore facts set forth in the Amended Complaint that undermine the Appellants' claim. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998); 2 *Moore's Federal Practice* §12.38, at 12-102.1 (3d ed. 2001).

One fact in particular undermines at least a portion of their claim. Based on their Amended Complaint, the Appellants state that, because of the equal number of Democrats and Republicans on the Commission prior to use of the random selection procedure, "the probability of a deadlock is very high—if not inevitable." (Jurisdictional Statement 5.) Elsewhere, however, they acknowledge that, on one of the four occasions on which the Commission has been convened since 1970, redistricting was accomplished by the Commission without the random selection of a ninth member. (Jurisdictional Statement 6-7n.2.)

Application of the random selection procedure on three out of four occasions hardly establishes that its use is "inevitable." To the contrary, such a result suggests that, at least a significant part of the time, the political parties

will negotiate their redistricting differences through an equally-divided Commission. The State Appellees thus believe that the facts of record in this appeal do not in any way show that random selection is doomed to fail in its purpose of encouraging the parties to compromise.

ARGUMENT

The Appellants purport to attack the constitutionality of the random selection procedure on Equal Protection Clause and Due Process Clause grounds. The insubstantiality of the questions they raise, however, is demonstrated by the fact that the specific arguments they advance are made in their Jurisdictional Statement for the first time. The Appellants therefore have waived the main bases for their appeal, and they fail to show why the three-judge panel's decision is in need of plenary review.

I. The Random Selection Procedure Comports with Equal Protection

The Appellants' opening constitutional argument in the trial court was that the random selection procedure violates the Equal Protection Clause because it results in disparate treatment for Republicans and Democrats. (*See* Winters Plaintiffs' and Philip Intervenors' Memorandum of Law In Support of Their Motion for Judgment on the Pleadings ("Appellants' Mem.") 10.) The trial court found that the argument was made "[i]n rather summary fashion" and that it had no merit because the procedure "treats both political parties exactly the same and singles neither party out for disparate treatment." (Jurisdictional Statement 13a.)

A. The Appellants Have Waived Their Equal Protection Argument Based on Strict Scrutiny

The Appellants now argue that the trial court erred because it was required, but failed, to apply a strict scrutiny standard in considering their Equal Protection Clause claim. (Jurisdictional Statement 9.) They contend that their claim involves the fundamental right to vote, that the highest level of constitutional scrutiny therefore applies, and that the provision must fall because it is not narrowly tailored to serve a compelling interest of the State. (Jurisdictional Statement 10-12.)

The Appellants make these points for the first time in this appeal. Indeed, in the trial court, the Appellants argued in favor of application of the rational basis test to their equal protection position. Their opening brief quoted *Wichmann v. Bd. of Trs. of S. Ill. Univ.*, 180 F.3d 791, 798-99 (7th Cir. 1999), *vac. and rem. on other grounds*, 528 U.S. 1111 (2000), for the following proposition: "Equal Protection has long been held to require all state classification of persons to have at least a *rational basis,* treating similarly all similarly situated individuals." (Appellants' Mem. 10 (emphasis added).) They also quoted *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), for the following: "the classification *must be reasonable*, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike." (Appellants' Mem. 11 (emphasis added).) Apart from these quotes, the Appellants did not address in their briefs the level of scrutiny to be applied.

Only after the issue was raised by the trial court at oral argument did the Appellants' attorney suggest, without citing authority, that "strict scrutiny does apply" to

his equal protection position. (Sept. 28, 2001 Trans. 21.) Such cursory treatment of an issue hardly preserves it for appeal. *Nutrasweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 786 (7th Cir. 2000) (argument not supported with a single case citation was not properly presented for review); *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997) (matters not "squarely presented" in trial court, including constitutional claims, cannot be raised on appeal). Not having pressed their heightened scrutiny argument in the trial court, the Appellants are not entitled to pursue it here. *Heller v. Doe*, 509 U.S. 312, 318-19 (1993) (this Court would review equal protection claim under the rational basis test, where a heightened standard was not raised below).

The Appellants' failure to advance the argument in the trial court in a meaningful way, moreover, evidences its lack of substantiality. The Court should therefore dispose of the argument by summary affirmance.

B. The Trial Court Correctly Rejected the Equal Protection Clause Claim

There can be no substantial question, in any event, with respect to the correctness of the trial court's decision. The Appellants argue that the random selection procedure is not narrowly tailored to serve the State's compelling interest of assuring proper reapportionment. (Jurisdictional Statement 12.) They further argue that the procedure "guarantees that one political party and the members of that party will be excluded from the redistricting process" (Jurisdictional Statement 14), and that it therefore "treats similarly situated voters differently depending upon their political affiliation" (Jurisdictional Statement 15).

As for the "narrowly tailored" point, the trial court found that the purpose of the random selection procedure was, in the first instance, to serve as a catalyst for bipartisan cooperation during reapportionment. (Jurisdictional Statement 8a.) If cooperation fails and a deadlock is reached, the procedure obviously serves the secondary purpose of resolving the deadlock. While other approaches to accomplishing redistricting are clearly possible, the Appellants fail to articulate how the procedure could be more narrowly tailored to achieve the purposes of avoiding or resolving deadlocks. Their argument, at best, is a cursory one to which this Court should attach little weight when assessing the need for plenary review.

With respect to the supposed disparate treatment accorded voters based on their political party, the trial court found just the opposite. As noted above, it found that the random selection procedure treats both parties "exactly the same." The court went on:

> The two candidates chosen by the Supreme Court to be used in the drawing may not be of the same political party and each candidate's name is thrown into the hat only once, so each party stands an equal chance of winning (or losing) the drawing. As a result, the tie-breaking provision does not fall disproportionately on any discrete political party or otherwise afford unequal treatment to different political parties.

(Jurisdictional Statement 13a.) Indeed, the court cited two cases in the election context—*Weisberg v. Powell*, 417 F.2d 388, 394 (7th Cir. 1969), and *Mann v. Powell*, 333 F.Supp. 1261, 1267 (N.D. Ill. 1969)—where the courts required selection by lot to *avoid* equal protection violations. *See also Campbell v. Board of Education*, 310 F.

Supp. 94, 103 (E.D.N.Y. 1970) ("fact that an element of chance is incorporated into a method of election is not necessarily violative of the Equal Protection Clause").

Nor does the random selection procedure "guarantee" that one political party will be able to take advantage of the other. The Illinois Constitution's redistricting provisions (Jurisdictional Statement 24a-25a) provide for a multiple-phased redistricting process. The responsibility for drawing the new map is given first to the General Assembly and then to an eight-person Commission. The purpose of the random selection provision is to encourage these entities to draw the new map, not by chance, but by agreement. The random selection provision becomes necessary only if the agreement approach fails.

Even if the random selection procedure is used, moreover, it does not guarantee that one political party will be excluded from the process. It guarantees only that the Commission will be able to move past a deadlock and complete its work. The Commission members are still fully capable of being fair and engaging in a reasoned deliberation.

Finally, even if the redistricted map ends up "unfairly" favoring one political party, it does not do so as the result of chance. Rather, it does so as the result of, first, the inability of the members of the General Assembly and then an equally divided Commission to come to an agreement, and, second, the failure of the majority-party members on the Commission to give adequate consideration to the views of the minority-party members. This is a problem that may be addressed by the courts after the new map is submitted. *See, e.g., Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991) (addressing claims of unfairness in new congressional redistricting plans). It is not resolved by attacking the map-drawing

process, any more than unconstitutional legislation passed by Congress gives rise to an attack on the process by which members of Congress are elected.

II. The Random Selection Procedure Comports With Due Process

The Appellants also raised a due process argument in the trial court, but characterized it as procedural due process, not substantive. (*See* Winters Plaintiffs' and Philip Intervenors' Reply Brief In Support of Their Motion for Judgment on the Pleadings ("Appellants' Reply") 3-4.) The trial court rejected the argument as "a non-issue" (Jurisdictional Statement 13a), and the Appellants do not even raise it here. The trial court nevertheless addressed substantive due process and determined that the random selection procedure passed muster under the rational basis test. (Jurisdictional Statement 5a-12a.)

A. The Appellants Have Waived Their Substantive Due Process Argument Based on Strict Scrutiny

Although the Appellants' Jurisdictional Statement raises substantive due process and argues in favor of strict scrutiny, their trial court briefs were wholly silent on these matters. The Appellants' opening brief in the trial court claimed a due process violation, but it did not characterize the violation as substantive or procedural. (Appellants' Mem. 12-15.) The Appellants supported their position largely with State case law which similarly did not distinguish between substantive and procedural violations. In addition, neither the Appellants nor their case law addressed the severity of the burden—high or low scrutiny—and neither purported to apply a federal law

analysis. (*See* Defendants' Response to Other Parties' Motions for Judgment on the Pleadings 4-6.) The State Appellees guessed that the Appellants were arguing substantive, not procedural, due process and responded accordingly.

In their trial court reply, responding to the State Appellees' substantive due process arguments, the Appellants attempted to clarify their position. Citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), a procedural due process case, the Appellants asserted that they were alleging that the random selection provision "is a violation of procedural due process." (Appellants' Reply 3-4.) The Appellants' attorney maintained that position at oral argument. (Sept. 28, 2001 Trans. 12 (referring to "process that is due"), 21 (referring to the "procedural due process argument").) Even when pressed on whether he was conceding that there was no substantive due process violation, the attorney responded in the negative but explained that his argument would be "properly described" as a "procedural due process challenge." (*Id.* at 23.) At no time did the Appellants argue that a strict scrutiny analysis should apply to their due process claim.

Just as with their equal protection claim, by not pursuing their substantive due process/strict scrutiny argument in the trial court, the Appellants have waived it. *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299, 301 (7th Cir. 1996) (appellant waived substantive due process issues by not properly raising them in lower court). They have thus effectively waived all of the arguments made in their Jurisdictional Statement.

B. The Trial Court Correctly Rejected the Substantive Due Process Claim

As with the equal protection argument, there can be little question that the trial court properly disposed of whatever substantive due process claim was before it.

The court began by noting that "[a]ll the parties seem to agree some form of rational basis review is appropriate." (Jurisdictional Statement 5a.) This was because no one, not even the Appellants, argued in favor of some other level of review.

The trial court went on to suggest that one possible way to approach due process was under *Burdick v. Takushi*, 504 U.S. 428 (1992), where this Court upheld the validity of Hawaii's prohibition on write-in voting. (Jurisdictional Statement 5a-6a.) Under *Burdick*, a court is to assess an election law's burden on constitutional rights. If the burden is a high one, then a high level of scrutiny applies; if a low one, then the rational basis test applies. 504 U.S. at 433. The State Appellees argued in favor of applying *Burdick's* rational basis approach to uphold the random selection provision.

The trial court, however, decided to apply this Court's "more generic substantive due process analysis," which it said "point[ed] to a rational basis test." (Jurisdictional Statement 6a.) It proceeded to frame the level-of-scrutiny issue as whether a fundamental right exists "to have the tie-breaking member of a redistricting commission chosen by some means other than by lot." (Jurisdictional Statement 7a.) Because there is not, the court applied the rational basis test and found that the random selection provision is rationally related to its purposes of avoiding deadlocks and furthering the reapportionment process. (Jurisdictional Statement 9a-12a.)

The trial court's analysis is straightforward and unremarkable. It is consistent, moreover, with *Burdick* and with the many cases in which this Court has recognized that the primary responsibility for reapportionment lies with the States. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Growe v. Emison*, 507 U.S. 25, 33-34 (1993). The Appellants cite no cases inconsistent with the trial court's decision. No purpose would therefore be served by full briefing and argument.

CONCLUSION

For the foregoing reasons, the judgment below upholding the random selection procedure for breaking deadlocks on the Illinois Legislative Redistricting Commission should be affirmed.

Dated: March 1, 2002

Respectfully submitted,

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MAR 1 2002

No. 01-1114

IN THE

Supreme Court of the United States

DAVID WINTERS, *et al.*,

Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF APPELLEE JOHN TULLY TO DISMISS OR AFFIRM

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QUESTION PRESENTED FOR REVIEW

Whether the United States District Court for the Northern District of Illinois properly determined that the provision in the Illinois Constitution for the selection method to choose the ninth member of the Illinois Legislative Redistricting Commission does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

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Appellee John Tully hereby moves this Court, pursuant to Supreme Court Rule 18.6, to dismiss this appeal or to affirm the decision of the three-judge panel of the United States District Court for the Northern District of Illinois.

OVERVIEW OF THE MOTION

Appellants seek to have this Court review a decision of the three-judge panel in the district court that rejected Appellants' challenge to the constitutionality of Article IV, Section 3(b) of the Illinois Constitution: the November 20, 2001 opinion issued in this case, *Winters v. Illinois State Board of Elections*, Nos. 01 C 50229 and 01 C 6566, 2001 WL 1491581 (N.D. Ill. 2001), and granting the motions for judgment on the pleadings by defendants-appellees. (*See* Appendix A, Winters Jurisdictional Statement.)

The opinion of the three-judge panel, which unanimously rejected the claims of the Appellants, should be affirmed. The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment apply to, and govern, the content of the ultimate plan for redistricting adopted by a state, but neither of these Clauses has ever been held to invalidate, much less apply to, the content of the *body* that draws the plan. The Equal Protection Clause, in particular, has been held to prohibit vote dilution as well as racial and political gerrymandering. But the Appellants simply claim that Illinois' method for composing its Legislative Redistricting Commission ("the Commission") is invalid. To support this proposition, Appellants cite case law pertaining to one-person, one-vote and racial and political gerrymandering cases to claim that they have a fundamental right to have the Commission composed in a particular way. The question presented is whether Appellants possess a fundamental right to a certain composition of the Commission by a certain procedure. As the three-judge panel properly held:

"The answer to that is obviously, 'Of course not.'" *Winters*, 2001 WL 1491581 at * 3.

In any event, the State of Illinois' method for drawing its state redistricting scheme is a rational and logical method that easily satisfies the rational-basis test. In the event that the partisan, eight-member Commission — composed of four Democrats and four Republicans — fails to timely approve a redistricting plan, a ninth member is chosen by a random drawing from a pool of two candidates, not of the same political party. The clear point is that, during its deliberations, the eight-member Commission does not know the political affiliation of the so-called "tie-breaker," so that the Commission has the incentive to compromise, rather than risk an individual from the opposing political party casting the tie-breaking vote. Illinois' scheme is a rational one, and indeed better, as the court below noted, than those in other states where the tie-breaking vote can be predicted beforehand (because the "tie-breaker" is a particular individual or body whose political affiliation is known all along, such as the state's governor). Regardless of its comparison to other states, the State of Illinois has chosen a reasonable, rational method for composing the members of its redistricting body.

The redistricting process is an inherently political exercise, and this Court has often held that the judiciary should be reluctant to entangle itself in such matters absent a clear violation of the Constitution or statutes. Here, the final plan for redistricting the Illinois House and Senate adopted by Illinois is not even challenged in the Amended Complaint as violating the Constitution. This Court should not, for the first time, embroil itself in dictating to the states how they must compose their redistricting bodies. The judiciary was never intended to be anything but a means of last resort in redistricting matters, where the state political

process has either wholly failed to enact a plan or has enacted one that violates the Constitution or the Voting Rights Act. None of those facts are even alleged to exist here. The three-judge panel's ruling should be upheld.

STATEMENT OF THE CASE

I. Nature of the Case

A. The Illinois Constitution's Provision for Legislative Redistricting

At issue below was the constitutionality of the Illinois Constitution's provision for legislative redistricting. The people of the State of Illinois approved and enacted the current Illinois Constitution in 1970. Article IV, Section 3 of the Illinois Constitution governs redistricting of the Illinois House and Senate. Under that provision, in the year following each federal decennial census, the Illinois General Assembly is empowered by law to redistrict the Legislative (Senate) and Representative Districts. Ill. Const. 1970, Art. IV, § 3(b).

In the event the General Assembly fails to enact a plan, signed by the Governor, by June 30 of that year, a Legislative Redistricting Commission is formed by July 10. The Commission is composed of eight (8) members, two each appointed by the Speaker of the House, the Minority Leader of the House, the President of the Senate, and the Minority Leader of the Senate — in each case, one appointee is a member of the respective chamber, the other a public (*i.e.* unelected) member. The Constitution provides a deadline of August 10 for the Commission to approve a redistricting plan by a vote of five (5) members. If the Commission fails to do so, the Supreme Court of Illinois shall submit the names of two individuals, not of the same political party, to the

Illinois Secretary of State by no later than September 1.[1] The Secretary of State shall then draw, by random selection, the name of one of those two individuals to serve as the ninth member of the Commission. The Commission, composed of nine members, shall then approve a plan by October 5. The Supreme Court of Illinois is given original and exclusive jurisdiction over redistricting challenges. *Id.*

B. Appellants' Claims Before the Three-Judge District Court

Appellants filed suit below, challenging the constitutionality of Article IV, Section 3 of the Illinois Constitution — specifically, the manner in which Illinois breaks a deadlock on its eight-member Legislative Redistricting Commission to draw a plan for redistricting the Illinois House and Senate. Appellants did *not* allege that the ultimate plan adopted by the Commission violated any constitutional provision. That is, they did *not* allege that the final plan approved by the Commission violated the one-person, one-vote principle, or that it constituted a racial or political gerrymander, or even that it violated the Voting Rights Act.

Appellants did *not* allege that a tie-breaking mechanism, *per se*, was unconstitutional. Nor did they allege that the use of a partisan tie-breaker was unconstitutional. Rather, just as they do before this Court, Appellants alleged *only* that the manner in which that tie-breaking vote was selected was unconstitutional. That is, they focused solely on the Illinois

1. The Illinois Constitution simply provides that each of the two individuals selected for the random-selection pool be "not of the same political party." Ill. Const. 1970, Art. IV, § 3(b). It does not require that one individual be a Democrat and one a Republican, nor does it require that the individuals have any identified partisan affiliation whatsoever — provided that they are not of the same political party.

Constitution's provision that requires that the potential ninth member, if necessary, be chosen by random selection from two people, not of the same political party, selected by the Illinois Supreme Court. Under that provision, while the eight-member Commission (composed equally of each major political party) deliberates, the potential ninth member is unknown — most significantly, of course, the partisan affiliation — if any — of that individual is unknown. If and only if the eight-member Commission fails to approve a plan, a ninth member is chosen by lot, from a pool of two candidates not of the same political party. Simply put, the eight-member Commission does not know which political party will gain a majority of the Commission — or whether *either* party will gain the five-member majority — until after their deadline passes, giving each party an incentive to avoid the risk of uncertainty by compromising on a plan.

Appellants argued below that this random-selection procedure violated their "fundamental rights" and demanded strict scrutiny accordingly. They also claimed a violation of equal protection, as well as a violation of procedural due process.

C. The Court's Opinion Below

The three-judge panel below entered judgment on the pleadings against Appellants on all counts and, in doing so, made it clear that they did not even come close to proving their case. On the substantive due process claim, the court wrote: "'Is there a fundamental right to have the tie-breaking vote member of a redistricting commission chosen by some means other than by lot?' The answer to that is obviously, 'Of course not.'" *Winters*, 2001 WL 1491581 at * 3. The court applied the rational-basis test, "[a]s no other fundamental right is arguably implicated," *id.*, and rejected that claim.

The court found that the equal protection claim "merits little discussion" and "does not apply in the first instance because the tie-breaking provision does not create any sort of classification whatsoever." *Id.* at * 13. Appellants do not press their procedural due process claim before this Court; in any event, the court below wrote that it "fails to see how the tie-breaking provision implicates" procedural due process and rejected that claim as well. *Id.* at * 12.

ARGUMENT

A. Section 3(b) Does Not Impinge Upon The Fundamental Right To Vote And Is Not Subject To Strict Scrutiny.

The court below properly rejected Appellants' attempts to cast this case in terms of the fundamental right to vote. Article IV, § 3 of the Illinois Constitution does not impact the right to vote in any practical way whatsoever. To the extent even an abstract, attenuated connection could be made between the tie-breaking provision and the right to vote, it is nowhere near the impact necessary to trigger strict scrutiny. The court below properly utilized the rational-basis test and upheld Article IV, § 3.

1. Article IV, § 3 Does Not Implicate Any Fundamental Right, Let Alone The Right to Vote

The "liberty" component of the Due Process Clause of the Fourteenth Amendment is obviously broadly worded. This Court has long recognized that, when faced with an attempt to invoke a "fundamental right," the Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Thus, this Court has

"required in substantive due process cases a 'careful description of the asserted fundamental liberty interest.'" *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)). In *Glucksburg*, for example, where plaintiffs challenged the state of Washington's ban on assisted suicide, plaintiffs and the *en banc* court below termed the "liberty" interest broadly as the right to "control the time and manner of one's death," the "right to die," and the right "to control of one's final days." *Glucksburg*, 521 U.S. at 709, 722. This Court, however, more carefully framed the alleged fundamental right as the right "to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723.

Before carefully framing the relevant "fundamental right" at issue, it is critical to consider what Appellants allege and — more significantly — what they do *not* allege. Appellants do not argue that the provision directing the General Assembly to enact a redistricting plan is unconstitutional. Nor do they challenge the provision that allows an eight-member Commission to approve a plan — indeed, the Commission as initially composed achieves the perfect balance between political parties, public members versus elected officials, and House versus Senate appointees. Significantly, Appellants do not challenge the use of a tie-breaking mechanism as a general proposition. In fact, they do not even challenge the use of a *partisan* tie-breaker. *See* Jurisdictional Statement ("Jurisd. Stmt.") at 12-13 (favorably referring to other states' use of tie-breaking mechanisms which use the state's supreme court, governor, or other public figure). In other words, Appellants do not claim that the use of a tie-breaking vote cast by a person who is identified by his or her political affiliation violates their constitutional right to vote.

In sum, because they do not allege that their right to vote is infringed based on the use of a partisan tie-breaker, but only by a partisan tie-breaker drawn *at random*, Appellants'

attack is clearly focused on nothing more than the selection process itself, and not on the "right to vote." Thus, the court below was correct in framing the alleged fundamental right as the "fundamental right to have the tie-breaking member of a redistricting commission chosen by some means other than by lot." *Winters*, 2001 WL 1491581 at * 3. As the court correctly reasoned, "interpreting the tie-breaking provision as falling under the umbrella of the right to vote in this way is premised on a much more abstract notion of the right than the Supreme Court's substantive due process jurisprudence allows." *Id.*

It should go without saying that this alleged "right" to a tie-breaking mechanism, free of random selection, falls far short of a right "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As the court below succinctly put it, answering the question of whether such a fundamental right exists: "'Of course not.'" *Winters*, 2001 WL 1491581 at * 3. Appellants have not established the existence of a fundamental right in this matter.

2. The Right To Vote Is Not Impacted By Article IV, § 3

Appellants understandably seek to dress up their alleged "fundamental right" as the fundamental right to vote. This argument is without merit for two reasons. First, the right to vote is not implicated at all by the tie-breaker provision of Article IV, § 3. Second, the right to vote is not a fundamental right *per se*, and to the extent that a remote, attenuated connection can be made between the tie-breaker provision and an Illinois citizen's right to vote, that extremely remote "infringement" clearly does not compel strict scrutiny.

Though Appellants allege that the tie-breaker provision burdens their fundamental right to vote, they provide literally no argument in support of this contention. They make no attempt to connect a constitutional provision that breaks a deadlock in the Commission with the right to vote. Clearly, Article IV, § 3 does not impact ballot access. It does not impose requirements on eligibility to vote. It does not affect access to the polls. It does not call for the filling of vacancies between elections. It does not disqualify citizens from serving as election judges. It does not impede the ability of voters to vote for write-in candidates. It does not require that redistricting be based predominately on race. It does not violate the one-person, one-vote guarantee (indeed, paragraph (a) of Article IV, § 3 requires that districts be "substantially equal in population").

The only plausible connection that can even be inferred from Appellants' arguments is that the redistricting plan, *once drawn*, will disadvantage the "losing" political party and somehow affect the rights of people who vote for that political party. Putting aside the fact that this is an extremely speculative claim, the fact remains that Appellants have not made this allegation. They do not attack the end result of the plan. They do not allege political gerrymandering. Nor would they even have standing to do so, for the Amended Complaint does not allege that any of the Appellants are citizens, or legislators, belonging to a particular political party. (Amended Complaint, ¶¶ 4-7.) Absent such allegations of impact on voters or legislators of a particular political party, there is absolutely no connection whatsoever between the tie-breaking provision and the right of an Illinois citizen to cast a vote. There is no allegation, much less a logical basis, to even suggest that an Illinois voter is "impacted" in any way by the tie-breaking provision.

Moreover, even if a minimal, attenuated impact on the right to vote were present, strict scrutiny is not applicable. "The 'right to vote, *per se*, is not a constitutionally protected

right.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)). This Court has properly and repeatedly recognized that *any* election law or regulation could be interpreted as imposing *some* burden on individual voters, but "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to serve a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

To the contrary, this Court has adopted a more flexible approach to reviewing alleged restrictions on the right to vote. Where the alleged impact on the right to vote is minimal, or reasonable and nondiscriminatory, a rational-basis test applies. *Burdick*, 504 U.S. at 434. This Appellee has already demonstrated above that, even crediting everything alleged by Appellants, if any "restriction" on the right to vote exists at all, it is a faint, remote one. Certainly, the tie-breaker provision cannot be equated with such restrictions as poll taxes, onerous signature requirements for third-party candidates, or the like. Indeed, the tie-breaker provision is far less "burdensome" on a citizen's right to vote than was Hawaii's complete ban on write-in voting (which this Court upheld in *Burdick*, 504 U.S. 428) or Puerto Rico's law allowing only the incumbent political party — and not the voters — to fill mid-term vacancies for a member of the House of Representatives (which this Court upheld in *Rodriguez*, 457 U.S. 1).

Painting with an unreasonably broad brush, Appellants argue that the "fundamental right to vote encompasses redistricting matters" and cite to many cases concerning fundamental rights. (Jurisd. Stmt. at 10-12.) It is true in a

general sense that a fundamental right to vote exists, but it is clearly not true that such a right is implicated in the context of this case. As discussed above, the fundamental right to vote can be impacted by the content of the final redistricting plan adopted by a state, but no court has ever held that the Constitution is offended by the particular content of the *body* that drew the plan. Appellants' case citations are patently distinguishable in this regard. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court considered reapportionment plans that violated the one-person, one-vote principle because the populations of certain districts varied wildly from others, resulting in vote dilution. *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), involved state laws that had the effect of literally turning people away from the polling places; hardly a more direct impediment on the right to vote could take place. *Dunn* involved a requirement that voters must have lived in the state for a year, and in the relevant county for three months. *Harper* involved a poll tax that shut out indigent, and predominantly minority, voters.

The other cases cited by Appellants had nothing to do with the right to vote. *See Plyler v. Doe*, 457 U.S. 202 (1982) (involving the right of illegal aliens to a public education); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (the alleged right to assistance in committing suicide); *Harris v. McRae*, 448 U.S. 297 (1980) (the alleged right to federal funding of abortions); *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (the alleged right of new home purchasers to the same property tax basis as existing homeowners). Indeed, this Appellee cited *Glucksberg* above for the proposition that the courts must be careful to narrowly frame the alleged "fundamental right" at issue, so as to avoid what Appellants attempt to do here — sweep with a broad brush, and argue that *any* law that pertains in *any* way to reapportionment should be read to so dramatically impair the "right to vote" as to trigger strict scrutiny.

The three-judge panel correctly reasoned that this Court has receded "from its strict categorical approach to the right to vote." *Winters*, 2001 WL 1491581 at * 3 (comparing *Reynolds* with *Rodriguez* and *Burdick*). The three-judge panel correctly found that the right to vote was not implicated and that "no other fundamental right is arguably implicated," and applied a rational-basis test accordingly. *Id.*

Because no fundamental right is implicated by the tie-breaker provision of Article IV, § 3, and because that provision imposes, at best, an extremely remote burden on the right to vote, the highly deferential rational-basis standard governs this Court's analysis.

3. The Tie-Breaker Provision Is Rationally Related To A Legitimate Governmental Interest.

The tie-breaker provision of Article IV, § 3 of the Illinois Constitution easily survives rational-basis scrutiny. As the three-judge panel found, "No one seriously doubts the State of Illinois has a legitimate interest in legislative redistricting." *Winters*, 2001 WL 1491581 at * 4. Even Appellants acknowledge as much. (Jurisd. Stmt. at 12.) Thus, the State of Illinois need only demonstrate that its tie-breaker provision is rationally related to that legitimate governmental interest.

As discussed in more detail above, the use of the tie-breaking ninth Commission member arises only in the case of last resort at the map-drawing level, after both the General Assembly and the eight-member Commission have failed to produce a redistricting plan. In fact, the framers of the Illinois Constitution, whose work was ratified by the people in the 1970 election, clearly intended that the tie-breaking provision would serve as a catalyst for compromise within the eight-member Commission. The framers recognized the possibility

of designating a specific tie-breaker (e.g. the governor, or the state supreme court's chief justice), but specifically wanted the eight-member Commission to operate without knowing the political affiliation of that ninth member:

> The object of the reapportionment plan . . . is to reduce both political parties to a state of equivalency. We believe we achieve this by utilizing the random selection method of achieving a tie-breaker, where neither party could look ahead with certainty as to a potentional [sic] tie-breaker being more in line with their opinions than with the other party's opinions.
>
> [W]e believe we have adopted the most sensible [tie-breaker redistricting scheme] in that it does not at any stage give the impetus to one party or the other to stalemate, because it can look to the tie-breaker system and figure out that it might have a better advantage further down the road.

IV Record Of Proceedings, Sixth Illinois Constitutional Convention, at 2955, 2956 (July 21, 1970) (statements of Delegate Sommerschield).[2]

Thus, while Appellants complain that the tie-breaking vote is determined by "chance," in fact this was the precise purpose of the provision. The framers rationally and logically reasoned that if the eight-member Commission knew the identity of the potential ninth member beforehand, they would

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2. As the court below ruled based on cross-motions for judgment on the pleadings, the court struck all of the exhibits attached to the pleadings filed by the Appellants, with the exception of the verbatim transcripts from the Sixth Illinois Constitutional Convention, of which the court took judicial notice without converting the motions into ones for summary judgment. *Winters*, 2001 WL 149581 at * 2.

undoubtedly know his or her political affiliation as well, and the party to which the ninth member belonged would have no incentive to compromise with the "minority" party in the original eight-member Commission.[3]

Indeed, the court below correctly noted that Illinois' tie-breaker provision "may even be more rational than the procedures found in other states." *Winters*, 2001 WL 1491581 at * 4. For example, some states that break deadlocks in their redistricting commissions allow the tie-breaking member to be picked by the state supreme court, or its chief justice. *See, e.g.*, ALASKA CONST., art. VI, § 8(b) (chief justice selects); MONT. CONST., art. V, § 14(2) (chief justice selects); N.J. CONST., art. 4, § 3 (chief justice selects); PENN. CONST., art. II, § 17(b) (supreme court selects by majority vote).

As one example, New Jersey has a tie-breaker provision similar to that of Illinois. New Jersey's constitution provides for a 10-member Apportionment Commission: five

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3. Appellants complain that history has not borne out this reasoning. They quickly gloss over the fact that, in 1970, the eight-member Commission did, in fact, achieve compromise without resorting to a tie-breaker. (Amended Complaint, ¶ 31; Jurisd. Stmt. at 6, n.2.) Moreover, while it is true that in the last three redistricting cycles, a ninth member of the Commission was necessary to approve a map for the Illinois House and Senate, it does not follow that this makes the reasoning arbitrary or irrational. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory" to attempt novel approaches to questions of politics and public policy. *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1911) (Brandeis, J., dissenting). Reapportionment involves thorny issues of public policy, and the judiciary has no place in the political thicket merely because a political judgment may not have worked as effectively as the people might have hoped. *See Growe v. Emison*, 507 U.S. 25, 34 (1993); *Rodriguez*, 457 U.S. at 8 (Puerto Rico's system, which allowed the incumbent political party to hand-pick a mid-term replacement, was entitled to "substantial deference").

Democrats and five Republicans. N.J. CONST., art. 4, § 3. If the commission fails to craft a map by a fixed date, the Chief Justice of the New Jersey Supreme Court appoints an eleventh member. *Id.* The 11-member commission must establish a redistricting plan, by majority vote, within 30 days. *Id.; see also Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001). The Chief Justice, who is appointed by the governor, has unlimited discretion in selecting the eleventh member. *Id.*

The Illinois approach is a more thoughtful and impartial means of reaching a final districting plan at the Commission level because it eliminates the possibility of partisan politics in the selection of the ninth member. Here both Democrats and Republicans have an incentive to compromise, namely, the risk of losing the tie-breaker. In other states, the political party affiliated with the Chief Justice (or, in Pennsylvania with the Supreme Court majority) has no incentive to compromise, to the extent that it believes that the tie-breaker provision will likely work to its advantage.

Interestingly, Appellants concede the constitutionality of these tie-breaker provisions noted above, as well as those of other state constitutions, at page 13 of their Jurisdictional Statement. *See also* Iowa Const., art. III, § 35; Mich. Const., art. IV, § 6; Wash. Const., art. 2, § 43(6).[4] This is a telling concession on their part. Appellants concede the constitutionality of these seven constitutional provisions that break a commission deadlock by a predetermined individual or body, which either breaks the tie itself or chooses the tie-breaker. Yet these identified individuals are unquestionably as partisan as Illinois' ninth member, and the commission members of those respective states will undoubtedly

4. *See also* Jurisd. Stmt. at 12 (obviously including these states, with partisan tie-breaking provisions, as part of the "other 49 states . . . that do not violate the fundamental right to vote.")

recognize that individual's political affiliation. Thus, the only meaningful distinction between these other states' redistricting provisions and that of Illinois is a simple matter of timing — in the other states, the political affiliation is known *while* the commission deliberates, while in Illinois, the Commission does not know the political affiliation of the ninth member until *after* they have completed deliberations.

This is the only distinction between Illinois and these other states on this point, a simple matter of timing. Appellants misperceive this distinction as a weakness in the Illinois system and seek to drive a truck through this tiny hole they have created, lifting this minor distinction to one of a *constitutional* magnitude. They also briefly allude to the fact that these other states require "someone — whether it be the state supreme court, the governor, or other public figure — to be accountable for selecting the tie-breaker or choosing the plan." (Jurisd. Stmt. at 13.) But this "accountability" distinction is no distinction at all. The Illinois Supreme Court is every bit as accountable for its choice of two candidates for the random selection as are these other state supreme courts. The only difference is that the Supreme Court of Illinois provides two candidates, not one, but certainly the Court is accountable for either choice. The fact that Illinois does not allow its high court to pick only *one* person, or to select only *one* political party, like these other states, is a credit to Illinois. The Illinois Supreme Court could not engage in politics even if it were so inclined, whereas in states such as New Jersey, the chief justice can pick whomever he or she pleases. Illinois' system for choosing its tie-breaking member is far preferable to these other states, but it is not necessary for the Court to so hold. There can be no question that the choice that the people of the State of Illinois have made is a reasonable and non-arbitrary one, grounded in logic and common sense, and which is rationally related to its legitimate interest in legislative redistricting.

4. The Tie-Breaker Provision Is Not Outcome-Determinative.

Finally, Appellants go to great lengths to convince this Court that the moment the tie-breaking member is selected, the Illinois redistricting plan is a foregone conclusion. They argue that the selection of the ninth member "ensures one of the parties' total victory" and "dictates the process' conclusion. . . ." (Jurisd. Stmt. at 6, 16.) Appellants are flatly wrong in stating that the selection of the ninth member renders the result of the Illinois redistricting plan a foregone conclusion. First, the Illinois Constitution does not mandate that a Republican, or a Democrat, be placed into the pool of two candidates for random selection — it only requires that the two individuals must be "not of the same political party." Ill. Const. 1970, Art. IV, § 3(b). The two candidates could be politically affiliated with a party other than one of the two major parties, in which case the selected individual's participation as the ninth member would certainly not result in a "foregone conclusion."

Second, Appellants assume that all members of the Commission, both at the eight-member and nine-member levels, will automatically act in accordance with their partisan interests to the exclusion of all else. There is nothing in the Illinois Constitution that dictates that result, and Appellants concede that in 1970, the eight-member Commission compromised and agreed upon a plan for redistricting. (Amended Complaint, ¶ 31; Jurisd. Stmt. at 6, n.2.) Appellants cite no authority for the presumption that either the eight-member or nine-member Commission will consistently and exclusively act only to further the interests of their party.

Third, Appellants apparently assume that the Commission will be divided 4-4 at the eight-member level, where the ninth member (whom Appellants assume will be

either a Republican or Democrat) will cast the deciding vote. Again, there is no support in the record for such an inference. There is no limit in the Illinois Constitution to the number of redistricting plans that can be offered before the Commission, and it is entirely possible that the basis for the lack of a majority could be something other than an even 4-4 split: it is possible, for example, that 3 members could support Plan A, 3 members support Plan B, and 2 members support Plan C. In this event, it would be entirely plausible that the ninth member would not be a "tie-breaker" at all. It is possible, in the above example, that the ninth member would support Plan A (giving it four votes), but that the members supporting Plans B and C would join together for five votes — in which case the tie would be broken without the ninth member playing a decisive role. It is also entirely possible that, even with the ninth member, no redistricting plan would receive five votes, in which case the Illinois Supreme Court would assume its role and intervene to effect a plan for redistricting. *See People ex rel. Engle v. Kerner*, 210 N.E.2d 165 (Ill. 1965) (after the General Assembly failed to pass a plan for redistricting the senate, the Supreme Court adopted its own plan for redistricting the senate).

Fourth, even assuming that partisan concerns will always govern the votes of all members of the majority party on the Commission, and assuming that the ninth member's participation will inevitably and decisively lead to a partisan map approved on a 5-4 party-line vote — unsupported assumptions, all of them — the fourth step of the process of legislative redistricting in Illinois is review by the Illinois Supreme Court, which has proven to be anything but a "rubber stamp" since the adoption of the 1970 Constitution. The Illinois Supreme Court invalidated the 1970 plan, adopted by an eight-member Commission, because the Commission was unlawfully comprised — it failed to include public members. *People ex rel. Scott v. Grivetti*, 277 N.E.2d 881 (Ill. 1971). The Illinois Supreme Court redrew portions

of the 1980 plan, adopted by a nine-member Commission, because the districts did not satisfy the state-law requirement that districts be "compact." *Schrage v. State Board of Elections*, 430 N.E.2d 483 (Ill. 1981). The Illinois Supreme Court refused to accept the original 1991 plan for redistricting passed by the nine-member Commission and remanded the plan to the Commission for more extensive factual findings. *People ex rel. Burris v. Ryan*, 588 N.E.2d 1033 (Ill. 1992).

Thus, even if Appellants were correct that Illinois' use of a tie-breaking ninth Commission member preordains the map that will be drawn — and in a way constitutionally distinguishable from other states that use partisan tie-breakers as well — the fact remains that the Supreme Court of Illinois stands as a final safeguard to ensure the passage of a constitutional plan for redistricting.

Appellants' substantive due process claim rests on the false premise that they possess a fundamental right to a certain procedure for choosing a tie-breaking member of a redistricting commission. Because no such right exists, and because the "burden" allegedly imposed by Illinois' tie-breaker provision is minimal, if it exists all, on the voting rights of Illinois citizens, this Court's analysis is governed by the rational-basis test. The tie-breaking provision easily satisfies this standard. This Court should affirm the judgment below.

B. The Equal Protection Claim Is Without Merit

Finally, Appellants allege a violation of the Equal Protection Clause of the Fourteenth Amendment, based on a theory that lacks coherence. The court below found that "[t]his argument merits little discussion." *Winters*, 2001 WL 1491581 at * 7. The court below held that the Equal Protection Clause did not apply in the first instance, because the tie-breaker provision did not create any classifications

of any kind. *Id.* The court below was correct, and in their attempt to overcome this argument, Appellants even more clearly expose the flaw in their position. This Court should affirm the court below on the equal protection claim for two reasons: first, Appellants lack standing to raise this claim; and second, in any event, the tie-breaker provision does not single out any particular group of people for disparate treatment and, therefore, cannot violate equal protection.

1. Appellants Lack Standing To Raise An Equal Protection Claim

In response to the lower court's ruling that the tie-breaker provision does not create any particular classification for disparate treatment, Appellants write that: "Although Section 3(b) does not single out one political party *per se*, it, *by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process." (Jurisd. Stmt. at 14 (emphasis in original).) Appellants have all but conceded that they lack standing to bring this equal protection claim. In order to complain of an allegedly invidious classification, a plaintiff must be a member of that class — he or she must actually suffer a personal, concrete injury from the classification made by the state. *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (plaintiffs lacked standing to pursue racial gerrymandering claim against redistricting scheme because they were not personally aggrieved by the gerrymander). Appellants, first of all, do not identify themselves in their Amended Complaint as members of *either* political party. (Amended Complaint, ¶¶ 4-9.) Moreover, even had they done so, they have conceded that one political party is not singled out *per se* — they argue, instead, that *one* of the major political parties will be injured, but they fail to identify which political party.

If Appellants are attacking this tie-breaker provision as a facial challenge, as their argument implies (Jurisd. Stmt.

at p. 14 (noting that the provision, "*by design*, guarantees that one political party . . . will be excluded") (emphasis in original), then they lack standing to do so because they cannot show an injury to themselves based on the provision on its face. Appellants cannot be members of both political parties at the same time, and they cannot point to a specific, concrete injury from a redistricting provision that may, or may not, allegedly impact their rights. Moreover, because the Illinois Constitution does not dictate that a Republican or Democrat be placed into the two-person pool for random selection, it is by no means clear that one of the major political parties will benefit from the tie-breaking member — nor, as discussed above, is it even clear that the ninth member will cast the "decisive" vote even if he or she were a member of one of the major political parties. Thus, Appellants lack standing to raise a facial challenge to Article IV, § 3 of the Illinois Constitution.

If Appellants are attacking this provision *as applied*, they still lack standing because they do not allege that the tie-breaking provision, in this redistricting cycle, will operate to injure them. That is, they do not identify the "losing" political party in the tie-breaker in the 2001 redistricting cycle and they do not allege that they belong to that "losing" party. A member of the Democratic Party cannot assert the rights of a Republican, nor vice versa, and this Court cannot be left to guess which party "lost" the tie-breaker and which is the political party to which Appellants belong.

Standing is a jurisdictional requirement of Article III of the Constitution. This argument can be raised by the parties at any time, or by the Court *sua sponte*. *Adarand Constructors, Inc. v. Mineta*, __ U.S. __, 122 S. Ct. 511, 514 (2001). As plaintiffs below, it is Appellants' obligation to clearly establish standing under Article III to invoke federal jurisdiction. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Their failure to do so dooms their equal protection claim.

2. Appellants Do Not, And Cannot, Establish An Equal Protection Violation

To state a claim for equal protection, Appellants must show that the people of the State of Illinois, in ratifying Article IV, § 3 of the Illinois Constitution, have singled out a particular class for disparate treatment — *i.e.*, that similarly situated people are being treated differently. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Not only have Appellants failed to assert that they belong to a supposedly "disadvantaged" class, they have not asserted that any particular class is being singled out. Appellants devote space in their brief to only generalized equal protection principles. There is certainly a good deal of equal protection case law from this Court in the context of redistricting, but those cases concern the one-person, one-vote doctrine, as well as racial and political gerrymandering claims. None of the cases remotely touch on the issue presented herein, dealing not with the content of a redistricting *plan* but with the content of the redistricting *commission*.

Appellants make several misstatements of law and fact in claiming that the tie-breaker provision "*by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process." (Jurisd. Stmt. at 14.) (emphasis in original) First, the "minority" members of the Commission are not excluded from the process, by definition. Two of them are General Assembly members, who had the opportunity to participate in attempts by the General Assembly to enact a plan — a step that *predates* the Commission process altogether. Further, all four of the "minority" members of the Commission had from July 1 to August 10 of the relevant year — the time in which the eight-member Commission operates — to achieve compromise. *See* Ill. Const. 1970, Art. IV, § 3(b).

Second, Appellants' position constitutes a complete inversion of equal protection principles. They cannot identify a particular class that is "singled out" for disparate treatment; they identify *two potential classes*, and admit that the best they can do is state that one of them — which one they do not know — will be "singled out" by the process. Appellants clearly fail to state a claim under the Equal Protection Clause.

Finally, Appellants fail to acknowledge the obvious — that each of the two political parties is treated *alike* under the tie-breaking provision. Unlike other states, where a particular governmental official or body is given the opportunity to pick the plan or pick the tie-breaker, in Illinois, the Supreme Court selects two individuals not of the same political party. Assuming that these two members in the pool are composed of one Democrat and one Republican, each political party has the same opportunity — a 50/50 chance — to have the ninth member placed on the Commission. Moreover, because the Illinois Constitution does not direct that individuals affiliated with the major political parties be part of the pool, it is not even clear that *either* party will gain an advantage. The Equal Protection Clause is certainly not offended when similarly situated persons are treated equally.

The judiciary's role is not to serve as the initial arbiter of drafting legislative maps, but rather to serve as the final step in the process to ensure that the map that was drawn meets constitutional principles. The U.S. Constitution ensures that a redistricting plan will not dilute votes due to a difference in the populations of districts; that it will not be based predominately on racial considerations; and that it will not have the effect of shutting one political party out of the political process as a whole. Simply put, the U.S. Constitution has been held to apply to the content of the *map* drawn, whether by a legislature, a commission, or a court. But the Constitution does not dictate to the states any terms regarding

the content of the *body* that draws the plan. Because Appellants do not allege that the final redistricting plan adopted by Illinois violates the one-person, one-vote principle, or that it constitutes a racial or political gerrymander, the Constitution is satisfied, however the plan was drawn.

Appellants' assertion of a fundamental right, or a significant impairment of their right to vote, strains credibility. Illinois' use of random selection to break a deadlock on the Commission is entirely logical and rational. Appellants' equal protection claim lacks jurisdiction and, in any event, does not state a claim which this Court should address.

CONCLUSION

For the foregoing reasons, the Appellee, John Tully, respectfully requests that this Court dismiss this appeal and/or affirm the decision of the three-judge district court.

Respectfully submitted,

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